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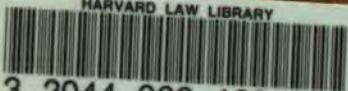
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MASSACHUSETTS REPORTS

149

CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MARCH 1889 — SEPTEMBER 1889

WILLIAM V KELLEN
REPORTER

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS MORTON, CHIEF JUSTICE.

HON. WALBRIDGE A. FIELD.

HON. CHARLES DEVENS.

HON. WILLIAM ALLEN.

HON. CHARLES ALLEN.

HON. OLIVER WENDELL HOLMES, JR.

HON. MARCUS P. KNOWLTON.

ATTORNEY GENERAL

HON. ANDREW J. WATERMAN.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

SUFFOLK SAVINGS BANK FOR SEAMEN AND OTHERS,
petitioner.

Suffolk. January 31, February 1, 1889. — March 1, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Savings Bank — State Tax — Banking Building — Exemption — “Deposits.”

Under the Pub. Sts. c. 13, § 20, exempting from a State tax so much of savings bank “deposits as are invested in real estate used for banking purposes,” the exemption extends to the whole of a bank building erected by such a bank under the authority conferred by the Pub. Sts. c. 116, § 20, cl. 7, and is not confined to that part of it actually used in the transaction of its business.

The “deposits” exempted from such tax denote all the funds received from depositors and held by the savings bank for investment, including profits and the guaranty fund required by the Pub. Sts. c. 116, § 24.

PETITION filed July 31, 1888, under the Pub. Sts. c. 13, § 64, for the abatement of a State tax upon that part of the petitioner’s bank building in the city of Boston not actually used in its business, on the ground that it was already taxed by the city. Hearing upon the pleadings before *Field, J.*, who reserved the case for the consideration of the full court, in substance as follows.

The petitioner began to erect the main portion of the building in question, which was numbered 47 to 53 Tremont Street in

Boston, in 1870, upon land purchased by the bank about that time. The books of the bank showed that \$150,000 of the funds of the bank were on May 1, 1888, invested in such land and building, an amount less than ten per cent of its deposits, of which \$112,500 were invested in that portion of the building actually used by it in its business. The building consisted of five stories, of which the lowest was a basement, and the first floor and a portion of the rear of the basement were used for banking purposes. All the rest of the building, including the front of the basement and the rooms above the first floor, was rented or to let, the rents thereof, if it was entirely occupied, amounting to \$10,350. The lot on which the building stands is no larger than was necessary for the erection of a building sufficient to satisfy the needs of the bank in the convenient transaction of its business. The bank absolutely requires all of the first or principal floor of the building actually erected for the purposes of its business, and could not conveniently use for its business the rooms above the first floor. In erecting the building for the use of the bank, it was a prudent investment of money to erect a building more than one story in height, and the building actually erected was in this respect no higher, nor did it contain more stories in front, than were reasonably necessary in order to make the best use of the land purchased. Although the bank could not properly or conveniently do its business in the rooms above the first floor, or wholly in the basement, yet it would have been unwise management to have invested its money in the erection of a building upon this lot of land which should contain neither such rooms nor basement. The site was a suitable site, and the building erected was a suitable building to be used for banking purposes by the petitioner, and for the convenient transaction of its business.

From 1876 to 1888, the bank set apart in each year a guaranty fund, which in May, 1888, amounted to \$452,498.93, and from 1870 to 1888 the bank also held moneys which were carried on its books as profits, which in 1887 amounted to \$183,518.63. This guaranty fund and such profits were mingled with other moneys of the bank, and were invested indiscriminately with other moneys. The profits and guaranty fund have never been

included in the sums upon which any State tax has been paid. The bank held varying amounts of cash from 1870 to 1888, which in 1887 amounted to \$34,367.56. The books of the bank do not show any separate investment of what is called by them "deposit money," "guaranty fund," or "profits," or that the bank building was constructed distinctively out of either of such funds.

On these facts the judge ruled that the petitioner was entitled to the abatement.

F. C. Lowell, for the petitioner, cited *De Soto Bank v. Memphis*, 6 Baxter, 415, and *Bank v. Tennessee*, 104 U. S. 493; *Salem Iron Co. v. Danvers*, 10 Mass. 514; *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181, 186; *Murray v. Berkshire Ins. Co.* 104 Mass. 586; *American Bank v. Mumford*, 4 R. I. 478; *Augusta Savings Bank v. Augusta*, 56 Maine, 176; *New Haven v. City Bank*, 31 Conn. 106; *Toll-Bridge Co. v. Osborn*, 35 Conn. 7; *Osborn v. New York & New Haven Railroad*, 40 Conn. 491; *State v. Collector of Chambersburg*, 8 Vroom, 258; *Coatesville Gas Co. v. Chester*, 97 Penn. St. 476.

H. C. Bliss, First Assistant Attorney General, for the Commonwealth, cited *Commonwealth v. People's Savings Bank*, 5 Allen, 428; *Oliver v. Washington Mills*, 11 Allen, 268; *Cambridge v. County Commissioners*, 114 Mass. 337; *Huntington v. Savings Bank*, 96 U. S. 388.

HOLMES, J. This is a petition under the Pub. Sts. c. 13, § 64, for an abatement of a tax upon so much of the petitioner's bank building as is not actually used by it for the transaction of its business. It appears from the report of the justice who tried the case that the building covers no greater area than is necessary for a suitable building; but in the prudent management of the land it was proper to build it with more stories than were needed for the use of the savings bank, and that has been done. These stories the petitioner lets, and it is with regard to these that the question is raised.

By the Pub. Sts. c. 116, § 20, cl. 7 (St. 1876, c. 203, § 9, cl. 6; St. 1870, c. 226), "Ten per cent of the deposits of any such corporation, but not exceeding two hundred thousand dollars, may be invested in the purchase of a suitable site and the erection or preparation of a suitable building for the convenient transac-

tion of its business." This section authorized the petitioner to erect such a building as it has built. It is not argued that the additional stories were beyond the authority conferred, and the original act of 1870 expressly recognized the possible necessity of building so that there would be some space not needed for banking purposes, by requiring all income arising from such real estate to be devoted exclusively to the interests of the corporation.

The next clause of the Pub. Sts. c. 116, § 20, (St. 1876, c. 203, § 26,) authorizes savings banks to hold real estate acquired by foreclosure or mortgage sale for five years. These are the only cases in which the statutes have provided for savings banks holding real estate.

By the Pub. Sts. c. 13, § 20, savings banks are to pay a State tax, on account of their depositors, assessed on their deposits, "provided that so much of the deposits as are invested in real estate used for banking purposes, or in loans secured by mortgages of taxable real estate, shall be exempt from taxation under the provisions of this section, and that so much of said deposits as are invested in real estate, the title to which has been acquired by the completion of foreclosure, or by purchase under the provisions of section twenty of chapter one hundred and sixteen, shall be exempt from taxation under the provisions of this section for the period named in said section." It is manifest that the purpose of this section is to avoid double taxation, and that purpose is expressly declared by the St. of 1881, c. 304, from which this section is taken. The act of 1881 is entitled, "An Act relieving property from double taxation in certain cases."

The general purpose of the act being thus apparent, it is carried out by exempting all land which savings banks are authorized to hold, unless a slight variation in phraseology as to the bank building makes an exception in that case; the plain reason being that all the land is subject to local taxation in the city or town where it lies. For a similar reason, funds invested in loans secured by mortgages of taxable real estate are also exempted. For this part of the discussion it does not matter whether the theory on which the Legislature proceeds is true or not, although we see no reason to doubt its substantial correctness. It is enough for purposes of construction that the

statute does proceed upon that theory expressly. And this being so, it is manifest that those parts of an authorized bank building which are not used for banking purposes are as much within the supposed evil sought to be remedied as those which are occupied by the bank. A general view of the objects of the act leads to the conclusion that the petitioner's contention is right.

The language of the act leads to the same result. "So much of the deposits as are invested in real estate used for banking purposes," on the face of it, refers to all the deposits invested in that land, and to the whole piece of land. The case is unlike *Cambridge v. County Commissioners*, 114 Mass. 837, both in the language used and in the purpose of the statute to be construed. There the statute under consideration, Gen. Sts. c. 11, § 5, cl. 3, was one absolutely exempting literary institutions, etc. from taxation on real estate belonging to such institutions, occupied by them or their officers, for the purposes for which they were incorporated, and it rightly was assumed by both parties, and by the court, that the exemption was confined to the portion of a building actually occupied for the purposes mentioned. *Pierce v. Cambridge*, 2 Cush. 611. *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212. *Lynn Workingmen's Aid Association v. Lynn*, 136 Mass. 283. In *Bank v. Tennessee*, 104 U. S. 493, it was assumed that the exemption was coextensive with the authority given the bank, although it was held, following the decision of the Supreme Court of Tennessee in the same case, *De Soto Bank v. Memphis*, 6 Baxter, 415, that the authority was confined to so much of the building as was actually necessary for the use of the bank. The case is too unlike the present to throw much light upon it.

It is argued for the Commonwealth, that it does not appear that all the funds invested in this bank building are deposits of the bank, within the words of the Pub. Sts. c. 13, § 20, because, so far as appears, a part of the guaranty fund required by the Pub. Sts. c. 116, § 24, (St. 1876, c. 203, § 13,) to be set aside from the net profits of the last six months at the time of making a semiannual dividend may be represented by the bank building. The building was built in this case before a guaranty fund was required by law. But the true answer to this contention is, that

§ 20 of the Pub. Sts. c. 13, does not contemplate any such distinction between the guaranty fund and other funds of the bank.

The tax imposed by that section is assessed on the average amount of the bank's deposits during the six months preceding May 1 and November 1, respectively. Deposits here mean the amounts with which the bank stands charged on its books as received from depositors, not any particular part of the investments of the bank. Then the statute goes on to exempt so much of the deposits as are invested in the specified ways. It is very plain that the word "deposits" is used in the second half of the section in substantially the same sense as in the first half. It means the total amount received for which the bank is accountable. But it does not mean merely the identical money received, it means the fund now representing the original deposit and assumed to be equal to it. But the guaranty fund is a part of that fund. If it were not contemplated that it might be needed to repay the depositors the amount put in by them, it would not be required. The declared purpose of it is to meet losses in the corporation's business, from depreciation of its securities, or otherwise.

When the act of 1881 proclaimed the purpose to relieve property from double taxation, it plainly assumed, for purposes of practical justice, that a tax on average deposits came to about the same thing as a tax on the bank's investments at a valuation of them. An exemption of certain property to avoid double taxation would have been absurd, unless the tax on deposits practically taxed that property. But if so, a tax on all the deposits was treated as equivalent to a tax on all the property, not a tax on some selected part not mentioned. The statute gives no color to the notion that investments less profits and guaranty fund are taken to be equal to the deposits. As we have just said, if so, why require a guaranty fund? Moreover, it is to be remembered that, while the result in the case of a successful bank may be that a small proportion of its total assets may escape taxation, if unsuccessful it has to pay the same tax, although it has no profits, and its total assets, including the guaranty fund, are not enough to pay the deposits in full. We are of opinion that the word "deposits" is used in this part of § 20 to signify all the funds which the bank holds for investment.

Decree for petitioner.

COMMONWEALTH vs. MICHAEL HART.

Middlesex. February 4, 1889. — March 1, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Complaint to Police Court — Nolle Prosequi by Judge — Plea of Former Acquittal.

On a complaint to a police court, the defendant pleaded not guilty, and was put upon his trial, and, after evidence was heard against him, the judge "nol pros'd" the complaint and discharged him. *Held*, that this amounted to an acquittal of the defendant.

COMPLAINT on the Pub. Sts. c. 101, §§ 6, 7, to the Police Court of Newton, for keeping a common nuisance on the first day of August, 1888, and on divers days between that day and the tenth day of September, 1888.

Trial in the Superior Court, on appeal, before *Mason, J.*, who allowed the following bill of exceptions:

"The defendant duly pleaded in bar of said complaint that he was tried and acquitted on a complaint relating to the same tenement, and charging the same offence, on the tenth day of September, 1888, by said police court, said complaint covering a part of the time alleged in the complaint on trial, and it was admitted at this trial that on said complaint he pleaded not guilty; that one witness for the government was heard at a trial thereon; and the case continued until the tenth day of September, 1888, when the court *nol pros'd* the complaint and discharged the defendant. The defendant claimed, and asked the court to rule, that the above facts would be a bar to the complaint on trial, but the court refused so to rule, the defendant excepting; and on a trial upon the merits, the jury convicted the defendant."

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

W. ALLEN, J. To a complaint brought before a police court for a misdemeanor, the defendant pleaded in bar a former acquittal by the same court on a complaint for the same offence. The defendant pleaded not guilty to the former complaint, and was put upon his trial thereon, and evidence heard against him,

and he was discharged. The only ground for holding that the former judgment is not a bar is in the statement that during the progress of the trial "the court *nol pros'd* the complaint."

In general a person put upon trial for a crime is thereby put in jeopardy, and cannot be again tried for the same offence. Of the exceptions to this rule it is necessary to refer only to the one upon which the Commonwealth relies, — when a prosecution is terminated during the progress of a trial by the entry of a *nolle prosequi* by the Commonwealth's attorney, with the consent of the defendant. The general right of a defendant on trial to insist upon a determination of the trial which will bar another prosecution is admitted; but it is claimed that the attorney for the Commonwealth has a right to enter a *nolle prosequi* during a trial, and leave with the defendant his right to a verdict; and that if the defendant does not insist upon that right, but accepts his discharge without a verdict, there will be no bar to another prosecution. It would seem that after the termination of a prosecution there would be nothing before the court upon which a verdict could be rendered, and that the court could do nothing except to discharge the defendant. The true rule would seem to be, that, after a trial has commenced, the Commonwealth's attorney, though he has the power, has not the right, to terminate the prosecution without a verdict; and his refusal of record to further prosecute the indictment has the effect of and amounts to an acquittal of the defendant, unless it is done with his consent. *Commonwealth v. Roby*, 12 Pick. 496. *Commonwealth v. Tuck*, 20 Pick. 356. *Commonwealth v. Scott*, 121 Mass. 33. *Commonwealth v. McCormick*, 130 Mass. 61.

But whatever the rule may be in regard to the discontinuance of a prosecution by the authorized attorney for the Commonwealth, we do not think that it applies to the case at bar. No *nolle prosequi* was entered in this case. Only an attorney authorized by the Commonwealth to represent it has authority to declare that he will not further prosecute a case in behalf of the Commonwealth. A court is not a prosecuting officer, and does not act as the attorney for the Commonwealth. Its office is judicial, — to hear and determine between the Commonwealth and the defendant. The fact that no authorized attorney for the Commonwealth is before the court does not give to it the

character and authority of an attorney. A court may terminate a prosecution by discharging a defendant before trial; *Commonwealth v. Bressant*, 126 Mass. 246; or during a trial; *Sayles v. Briggs*, 4 Met. 421. But it is by the judgment of a court, and not by the act of a prosecuting officer.

The formal record shows that the defendant was put on trial and was discharged. This is a record of acquittal. *Sayles v. Briggs*, 4 Met. 421. We think it has the same effect whether the statement that the "court *nol pros'd*" the complaint is rejected, or is construed to mean that the court dismissed the complaint without completing the trial. When the defendant was put on trial he was put in jeopardy. If there were facts, analogous to those that frequently exist in jury trials, which showed that there could not be a valid trial, as that the judge was interested, or in any way incapacitated from going on with the trial, or if the defendant consented that there should be another trial upon another complaint, such facts should appear. All that appears is that the judge, after the trial was commenced and partly concluded, decided to try the defendant again upon another complaint, and discharged him. We think this was properly pleaded as an acquittal. *Exceptions sustained.*

COMMONWEALTH vs. JULIUS S. SMITH.

Suffolk. February 4, 1889. — March 1, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Complaint — Sale of Skimmed Milk — Notice to or Knowledge of Buyer —
Question of Fact for Jury.*

At the trial of a complaint, on the St. of 1886, c. 318, § 2, for selling milk not of the standard quality, there being evidence that the milk was skimmed milk and sold from a measure duly marked, the jury were instructed that the defendant would be liable unless he sold the milk not as pure milk but as skimmed milk, and, further, that he would be liable unless the buyer had notice or knowledge that the milk was skimmed milk. *Held*, that the latter instruction was erroneous.

COMPLAINT alleging that the defendant, on August 1, 1888, "did sell to one Walter C. Babcock a certain quantity, to wit,

one pint, of milk not of good standard quality, that is to say, milk then and there containing less than thirteen per centum of milk solids."

At the trial in the Superior Court, before *Staples, J.*, Babcock testified that, at the instance of the milk inspector, he went to the defendant's grocery store in Boston and simply asked for a quart of milk; that the defendant took an empty can which he had with him to an ice chest in the rear part of his store, and then brought it back with a quart of milk in it, for which he gave the defendant six cents; that he did not know what kind of milk was sold there, or what he was expected to get; and that he handed over the milk to the milk inspector. A chemist, one of the milk inspector's assistants, testified that he made an analysis of the milk brought in by Babcock; that while it contained less than thirteen per cent of milk solids, it contained more than the amount required for skimmed milk.

The defendant testified that he did not remember Babcock, or know whether he sold him milk or not; that he was in the habit of buying skimmed milk for sale, which he resold at a profit; that he sold such milk, including the milk in question, from a measure which had the words "skimmed milk" marked upon it as required by law; that he had sold such milk for four years, and his customers were generally regular customers, who knew the kind of milk he kept; that if any one asked for a quart of milk, he would not tell him that it was skimmed milk; and that he usually took the purchaser's can, went to his ice chest, got the milk from it, and put it into the customer's can.

The defendant asked the judge to rule as follows:

"1. If the jury find and believe that the defendant sold milk of the legal skimmed milk standard out of a can or measure legally marked skimmed milk, they cannot convict on this complaint. 2. Selling such milk out of a can or measure so marked, with no representation save what is indicated by that marking, would be in law a sale of skimmed milk. 3. When milk of legal standard quality for skimmed milk is sold from a can or measure legally marked skimmed milk, no statement need be made by the seller to the buyer that the milk is skimmed milk, the marking alone is sufficient. 4. If the jury find and believe that milk from which the cream or some portion thereof was

removed, was sold as pure milk, they cannot convict under this complaint."

The judge refused to give the first and fourth instructions requested, but gave the second, with the addition of the words, "if through the marking actual notice was given to the buyer of the kind of milk which he bought," and also gave the third instruction with the omission of the final words, "the marking alone is sufficient." The judge then instructed the jury, that notice of the quality of the milk must be given in some way; that the marking would be sufficient if it gave the notice; it is sufficient if the buyer was informed by it, or if it was understood by or known to the buyer that the article he buys is skimmed milk, but in some way that there must be notice or knowledge, either by marks or in some other way; that the defendant would be liable unless he sold the milk not as pure milk, but as skimmed milk, and out of a can or measure marked as the law requires; and that in order to his defence it must appear that the milk was sold as skimmed milk, and from a measure or can lawfully marked; both must concur.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. G. Holcombe, for the defendant.

A. J. Waterman, Attorney General, & *H. C. Bliss*, First Assistant Attorney General, for the Commonwealth.

W. ALLEN, J. The complaint is for selling milk not of the standard quality of pure milk, that is, milk containing less than thirteen per cent of milk solids. The defendant had a right to sell skimmed milk, which is not of the standard quality of pure milk, from cans marked in a certain manner. If he sold milk not of the standard quality of pure milk, and not sold as skimmed milk from duly marked vessels, he would be liable on this complaint; if he sold milk as skimmed milk from duly marked vessels, he would not be liable. *Commonwealth v. Tobias*, 141 Mass. 129. Upon evidence tending to prove that the milk sold was skimmed milk, and that it was sold from a measure duly marked, the jury were instructed that the defendant would be liable, unless he sold the milk, not as pure milk, but as skimmed milk.

The jury were further instructed, that the defendant would

be liable unless the buyer had notice or knowledge that the milk was skimmed milk. We think this instruction was wrong. The question whether the defendant sold the milk as skimmed milk or as pure milk was a question of fact for the jury upon all the evidence. The fact that the buyer did not know that he bought skimmed milk would not afford an inference of law that the seller sold it as pure milk. If the defendant sold the milk in the lawful and the usual manner in which he sold skimmed milk, and for the usual price of such milk, and if he had reason to believe that that was what the purchaser intended to call for and expected to receive, it would be competent for the jury to find that he sold it as skimmed milk, and not as pure milk, although he may have mistaken the intention of the purchaser.

Exceptions sustained.

WILLIAM FEARING, 2D, vs. MARY E. R. JONES.

Suffolk. February 4, 1889. — March 1, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Donatio Causa Mortis — Delivery.

A person whose wife was in an insane asylum, and who had quarrelled with his daughters, said in his room, two days before his death, to the woman with whom he boarded, "I did hope to live to see the end of my wife," to which she replied, "What shall I do if anything happens to you?" whereupon he said, "Go for C. the undertaker; have me buried with the money from the Mechanic Association; and do as you please with what I have." There was no ceremony of delivery of various articles which he had, most of which were in the room and all of them in her house, and she did not touch them until after his death. Held, that there were neither words of present gift nor delivery to constitute a *donatio causa mortis*.

BILL IN EQUITY by the administrator of the estate of Perez Cushing, to recover certain personal property of the intestate claimed by the defendant as a gift *mortis causa* from the intestate to her. Trial in the Superior Court, upon issues to a jury, before Dunbar, J., who ordered a verdict for the plaintiff; and the defendant alleged exceptions. The material facts are in the opinion.

W. H. H. Emmons, for the defendant.

S. W. Trowbridge, for the plaintiff.

HOLMES, J. The evidence relied on to show a *donatio causa mortis* by Cushing to the defendant is as follows. Cushing boarded with the defendant, his wife was in an insane hospital, and he had quarrelled with his daughters. Two days before his death, he said to the defendant in his room, "I did hope to live to see the end of my wife." The defendant replied, "What shall I do if anything happens to you?" Cushing said, "Go for Cole, the undertaker; have me buried with the money from the Mechanic Association; and do as you please with what I have." There was no ceremony of delivery of any articles. Most of the property was present in Cushing's room, and all of it was in the defendant's house; but it does not appear that she attempted to intermeddle with it in any way before Cushing's death.

The words used did not purport to make a present gift, but looked only to the future, and to what should be done when Cushing died. As the language did not express a gift, it could not warrant the inference that there was a delivery without further overt acts on either side, even if such an inference might be drawn from different language, coupled with the ambiguous situation of the property. See *Waring v. Edmonds*, 11 Md. 424; *Cutting v. Gilman*, 41 N. H. 147. There was no other evidence of delivery, as the defendant did not touch the property in Cushing's lifetime. Both elements of a *donatio causa mortis*, words of present gift and delivery, are wanting. There is no occasion, therefore, to reconsider, as we are asked to do, the statement in *Marshall v. Berry*, 13 Allen, 43, 46, that an attempt to dispose of the donor's whole estate, as distinguished from specific articles capable of passing by delivery, is void.

Exceptions overruled.

DENNIS H. LANNAN vs. JAMES E. WALTER & another,
& trustee.

Suffolk. January 16, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Trustee Process — Set-off by Trustee.

If, before final answer in trustee process, the principal defendant becomes indebted to the trustee on any contract entered into before the service of the writ, the trustee has a right of set-off, and is chargeable only with the final balance, if one should be due.

TRUSTEE PROCESS. Writ dated November 15, 1886. The Globe National Bank, summoned as trustee, filed an answer on October 1, 1887, which alleged, in substance, that on November 15, 1886, the date of the service of the writ upon the trustee, there was deposited with it, to the credit of the defendants, who were among its depositors, the sum of \$927.10, and that the trustee had in its hands and possession no other goods, effects, or credits belonging to the defendants or either of them; that at the time of such service the trustee was, and has continued to be, the holder and owner of three several notes made and indorsed by various persons, and each indorsed by the defendants, for whom it had already discounted such notes, at their request and for their benefit; that the first of these three notes was for \$2,247.16, and was due on December 3, 1886; that payment of such note was duly demanded of the maker, who neglected to pay the same, and due notice of the non-payment thereof was given to the indorser, but that no part of such note had been paid; that the same remained wholly unpaid and owing to the trustee, except as to such part as might be deemed and adjudged to be paid by setting off the claim of the trustee against such defendants on such note and the claim of the defendants against the trustee on the amount of such deposit, the one against the other; that at the time of the service of the writ, the trustee believed that the maker and indorser of such note was insolvent, and believed and feared that the note would not be paid at maturity; that the second of such notes was for \$2,367.42,

dated June 12, 1886, and became due on December 15, 1886; that the third of such notes was for \$2,267.42, dated July 23, 1886, and became due on December 26, 1886; that neither of such two notes had been paid, except that the attorney of the indorser of one of them had paid on account of the trustee's claim against such indorser the sum of \$237.51, and that proper steps had been taken to fix the liability of the defendants and of other indorsers on each; and that all the makers and indorsers of the notes were insolvent. In the Superior Court the trustee was discharged; and the plaintiff appealed to this court.

P. J. Casey, for the plaintiff.

L. L. Scaife, (*B. G. Davis* with him,) for the trustee.

FIELD, J. The answer of the trustee on which it was discharged is, in effect, that at the time of the service of process it had in its deposits to the credit of the defendants \$927.10, and that at the same time it held three promissory notes which it had discounted for the benefit of the defendants, and on which they were indorsers; that since said service these notes have all matured; that the liability of the indorsers has been made absolute by due demand and notice; and that the makers and indorsers have all become insolvent, and the notes remain in its hands wholly unpaid, except that a small sum has been received on one of them. The amount due on each note is considerably more than \$927.10.

The counsel for the trustee contends that it has the right to set off the sum of money due from the defendants on any one of these notes against the deposit. We regard it as settled, that, "if before final answer the debtor becomes indebted to the" trustee "on any contract entered into before the service of the writ, the latter shall have a right of set-off, and be chargeable only with the final balance, if one should be due." *Boston Type Co. v. Mortimer*, 7 Pick. 166. *Smith v. Stearns*, 19 Pick. 20, 25. *Nickerson v. Chase*, 122 Mass. 296. *Eddy v. O'Hara*, 132 Mass. 56, 61. Pub. Sts. c. 183, § 27.

Judgment discharging trustee affirmed.

ROBERT B. CAVERLY vs. MARY C. ROBBINS.

Middlesex. January 29, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

United States Pension — Fee of Applicant's Attorney.

The U. S. St. of June 20, 1878, and the U. S. St. of July 4, 1884, prescribing the fees of attorneys or agents for services in procuring pensions, are not limited to such as are recognized or known to the commissioner of pensions as attorneys or agents of applicants for pensions.

CONTRACT upon an account annexed, for \$162, for services in procuring a pension for the defendant. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows.

Before this action was brought, the defendant had recovered a pension from the United States government, and in obtaining it had induced the plaintiff to do her clerical work, such as the drafting of depositions, etc., which she sent to the pension department under her own name. The plaintiff also had represented her before a commissioner appointed by the pension department in the taking of testimony, and had received for her, through his box at the post-office, communications from the department relating to the pension, and had written for her a large number of letters pertaining thereto, the defendant having, at the time of the plaintiff's service, no agent or attorney known as such at said department at Washington, and had advised her as to the different things to be done in the proper presentation of her claim. It was not pretended that the plaintiff was known or recognized at the department in Washington as a pension agent in this case, or that he had in any way connected himself with the pension department in this matter, the business there having been done solely by written communications by the defendant, his name not appearing on any of the papers there.

The defendant did not controvert the items of the plaintiff's account, otherwise than by contending that the U. S. St. of June 20, 1878, and other pension statutes, prescribed the amount the plaintiff could recover for his services.

The plaintiff asked the judge to instruct the jury as follows: "1. That this action is brought to recover an account for the professional services of a lawyer under the laws of Massachusetts, and not under any law of the United States. 2. In support of it he has offered evidence tending to prove all the items of his account, which, if believed, plaintiff is entitled to recover for the full amount of his claim, unless the United States statutes which defendant's attorneys have set up in the answer can come in here in bar of said claim. . . . 4. That it is not pretended that plaintiff was a pension agent in any of these matters, and I charge you that the rules as found in the pension statutes referred to in defendant's answer are not to be regarded by the jury as having anything to do with this case."

The judge refused so to instruct, but instructed the jury as follows: "The rule of law applicable to this case is, that a person rendering service is entitled to a reasonable compensation therefor, except so far as it may be modified by statutes of the United States applicable to services rendered in a pension case, or in presenting a claim for a pension. As to services in pension cases, the statute in force at the time the defendant applied to the plaintiff for his assistance forbids any attorney, agent, or other person demanding or receiving for his services in a pension case a greater sum than ten dollars. The statute in effect at the time the pension certificate was granted provided that 'no agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for a pension than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars.' And it was further provided, that, in the absence of any agreement in writing filed with the commissioner of pensions, the fee allowed should be ten dollars and no more. These provisions of law prevailed and were controlling here in those cases included in that language. If the jury find that any of the services rendered by the plaintiff to the defendant were within the descriptive language of said statutes relating to services, the plaintiff cannot recover more than ten dollars for such portion of his claim."

The jury returned a verdict for the plaintiff in the sum of \$10.25; and the plaintiff alleged exceptions to the above ruling.

J. L. Hunt, for the plaintiff.

G. A. A. Pevey & C. S. Lilley, (*G. W. Poore* with them,) for the defendant.

FIELD, J. The question of law raised by these exceptions seems to be whether, if the plaintiff, as an attorney at law, rendered services to the defendant in Massachusetts in procuring a pension for her from the United States, and if he was not known or recognized by the commissioner of pensions as a pension agent, and had in no way connected himself with the pension office, the amount of his fees for such services is to be determined by the statutes of the United States, or by what a jury may think they were reasonably worth.

The statute of the United States in force when the services were rendered was either the U. S. St. of June 20, 1878, 20 U. S. Sts. at Large, 243, or the U. S. St. of July 4, 1884, 23 U. S. Sts. at Large, 98. The latter statute, in § 4, makes it an offence punishable by fine or imprisonment, or both, for "any agent or attorney or other person instrumental in prosecuting any claim for pension" directly or indirectly to demand or receive "any greater compensation for his services or instrumentality in prosecuting a claim for pension . . . than is herein provided"; and the provision of the statute for compensation is, "In all cases where application is made for pension, . . . and no agreement is filed with the commissioner as herein provided, the fee shall be ten dollars and no more." The former statute is, "It shall be unlawful for any attorney, agent or other person to demand or receive for his services in a pension case a greater sum than ten dollars."

It is plain that these statutes are not limited to persons who are recognized or known to the commissioner of pensions as attorneys or agents of applicants for pensions. If the plaintiff's services were such as these statutes were intended to provide for, they determine the amount of the compensation he is entitled to receive. *Wolcott v. Friessell*, 134 Mass. 1.

Exceptions overruled.

ADELBERT E. CLAFLIN vs. WILLIAM CLAFLIN & others.

Suffolk. January 29, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Will — Trust — Termination.

A testator, by his will, after other liberal provisions for a son, gave one third of the residue of his personal estate to trustees in trust "to sell and dispose of the same and to pay the proceeds thereof to my son in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years." The trustees paid over ten thousand dollars to the son when he became twenty-one years of age, and thereupon he filed a bill in equity to obtain the rest of the fund. *Held*, that a valid restriction was imposed upon the son's possession and control of the fund, and that the terms of the will should be carried out.

BILL IN EQUITY, filed November 3, 1888, to terminate a trust for the benefit of the plaintiff under the will and codicil of his father, Wilbur F. Claflin, in the residue of his estate, against the trustees under the will and the plaintiff's mother and brother. The answer of the mother and brother admitted that the plaintiff had the entire beneficial interest in the principal and income of that portion of the trust fund held in trust for him, and made no claim to the same adverse to his right. Hearing before W. Allen, J., who ordered the bill to be dismissed; and the plaintiff appealed to the full court. The case, so far as material, is as follows.

Wilbur F. Claflin at his death left a widow and two sons, of whom the plaintiff was a minor. The will, which was dated July 27, 1885, and named William Claflin, James A. Woolson, and Horatio Newhall as executors and trustees, provided in the second clause that the sum of \$50,000 might remain in the hands of one of the executors for the period of five years, the income during that time to be equally divided between the wife and the two sons, the principal at the end of that period to fall into the residue of the estate; in the sixth clause, that a trust company should hold \$100,000 in trust to pay the net income of three several sums of \$30,000 to the wife and sons during their lives, and to pay over the principal of such sums at their

death, as they should appoint by will; in the ninth clause, that the persons named as executors and trustees in the will should hold \$60,000 to pay the net income of \$20,000 to his wife for five years, and, if she should die before the end of that time, to pay over the principal as she should appoint by will, or if she should live to the end of that period, to pay it over to her, and further to pay to each son the net income of \$20,000 for ten years, and, if either of them should die before the end of that time, to pay over that amount as he should appoint by will, or, if either of them should live to the end of that period, to pay it over to him; and in the eleventh clause as follows:

“Eleventh. All the rest and residue of all my personal estate I give, bequeath, and devise to William Claflin, James A. Woolson, and Horatio Newhall, all aforesaid, and to the survivors of them, but in trust nevertheless for the purposes following, viz.: to sell and dispose of the same, and to divide the proceeds equally among my wife, Mary A. Claflin, Clarence A. Claflin, my son, and Adelbert E. Claflin, my son, or their heirs by representation.”

The codicil, which was dated August 6, 1885, provided that, “Whereas in item ‘eleventh’ in said will I directed the three trustees therein named, viz. William Claflin, James A. Woolson, and Horatio Newhall, ‘to sell and dispose of the same, and to divide the proceeds equally among my wife, Mary A. Claflin, Clarence A. Claflin, my son, and Adelbert E. Claflin, my son, or their heirs by representation,’ now then I revoke and annul the provision of said will as above set forth, and instead thereof I declare the trust in the words following, which words are to be taken as a part of said will instead of the words revoked and annulled, viz.: to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years.”

The will and codicil were duly admitted to probate, and the executors proceeded to settle the estate according to their terms;

and when the plaintiff reached the age of twenty-one years the trustees paid over to him the sum of \$10,000.

The plaintiff contended that he had the entire beneficial interest both in the income of the third part of the rest and residue of the estate and in the property itself, and that no reasons existed why the same should be longer held by the trustees, as such further holding caused him unnecessary inconvenience and expense.

S. N. Aldrich & E. G. McInnes, for the plaintiff.

H. Baldwin, for the defendants.

FIELD, J. By the eleventh article of his will as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

Apparently, Adelbert E. Claflin was not quite twenty-one years old when his father died, but he some time ago reached that age and received ten thousand dollars from the trust. He has not yet reached the age of twenty-five years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is twenty-one years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it, and the weight of authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor, but there are several decisions to this effect by Masters of the Rolls and by Vice Chancellors. The cases are collected in Gray's Restraints

on Alienation, §§ 106-112, and Appendix II. See *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115, and, on appeal, Cr. & Ph. 240; *Rocke v. Rocke*, 9 Beav. 66; *In re Young's settlement*, 18 Beav. 199; *In re Jacob's will*, 29 Beav. 402; *Gosling v. Gosling*, H. R. V. Johns. 265; *Turnage v. Greene*, 2 Jones Eq. 63; *Battle v. Petway*, 5 Ired. 576.

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute. See *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 Allen, 339; *Russell v. Grinnell*, 105 Mass. 425; *Inches v. Hill*, 106 Mass. 575; *Sears v. Choate*, 146 Mass. 395. This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

In *Sears v. Choate* it is said, "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of ten thousand dollars payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he

reached the age of twenty-one years, by way of resulting trust, as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In *Inches v. Hill*, *ubi supra*, the same person had become owner of the equitable life estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See *Whall v. Converse*, 146 Mass. 345.

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect.

The decision in *Broadway National Bank v. Adams*, 133 Mass. 170, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford v. Lackland*, 2 Dillon, 6, a beneficiary who would

have been entitled to a conveyance of trust property at the age of twenty-six became a bankrupt at the age of twenty-four, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts in the will have been thus rendered impossible." But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. *Russell v. Grinnell*, 105 Mass. 425. See *Toner v. Collins*, 67 Iowa, 369; *Rhoads v. Rhoads*, 43 Ill. 239; *Lent v. Howard*, 89 N. Y. 169; *Barkley v. Dosser*, 15 Lea, 529; *Carmichael v. Thompson*, 5 Cent. Rep. 500; *Lampert v. Haydel*, 20 Mo. App. 616.

Decree affirmed.

JOHN C. WILSON vs. MARTIN-WILSON AUTOMATIC FIRE
ALARM COMPANY.

Suffolk. January 31, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Equitable Attachment — Letters Patent — Foreign Corporation — Decree.

Letters patent of the United States belonging to a corporation organized under the laws of another State, and with a usual place of business in this Commonwealth, and duly served with process, may be reached, under the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 235, by a creditor who is an inhabitant of this Commonwealth, and whose debt is the result of a contract made and to be performed here.

BILL IN EQUITY, under the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 235, to reach and apply certain letters patent in payment of a debt due to the plaintiff from the defendant.

The bill alleged that the defendant was a corporation established by law at Portland in the State of Maine, and having a usual place of business in Boston; that the defendant owed the plaintiff one thousand dollars for personal services as its treasurer and electrician, which amount the defendant had admitted to be due to the plaintiff, and had often promised to pay to him; that the defendant "had a factory, office, and machinery, and wire circuits and apparatus, of the value of upwards of eleven thousand dollars, in Boston, where it did the whole or greater part of the business for which it was organized; that the contract between the plaintiff and the defendant out of which grew the debt to the plaintiff was made and was to be performed in Boston, and that the president, treasurer, and all the members of the board of directors of the corporation are of Boston, or have places of business in said Boston"; that the plaintiff had been unable to discover any property of the defendant which could be come at to be attached, all the defendant's property in this Commonwealth having been attached already for more than its value to secure the claims of other creditors; that the defendant was the owner of certain letters patent of the United States for fire alarm apparatus, and of certain inventions or improvements in such apparatus; and that the defendant had by vote authorized the sale of such letters patent and patent rights, and its officers were about to sell the same at public auction in Boston. The prayer of the bill was that the plaintiff's claim might be established, that a receiver might be appointed to take possession of such letters patent and patent rights, and sell the same and apply the proceeds to the satisfaction of such claim, and that an injunction might issue to prevent the sale of the letters patent and inventions and patent rights by the defendant.

Service was accepted for the defendant by its attorney, "to the same extent that the plaintiff would have obtained service by leaving a copy of this writ with the commissioner of corporations, he having been duly authorized to receive service in accordance with the statute therein provided." *

* The St. of 1884, c. 330, § 1, the statute referred to, is as follows: "Every corporation established under the laws of any other State or foreign country, and hereafter having a usual place of business in this

The defendant demurred to the bill for want of jurisdiction, and because "this court has no power to enforce any decree which it might make to afford the plaintiff the relief sought by his bill of complaint, or any other relief, upon the facts charged in his said bill."

Hearing in the Superior Court upon the bill and demurrer, before *Barker, J.*, who overruled the demurrer and reported the case for the determination of this court.

G. Putnam & R. D. Weston-Smith, for the defendant, cited *Silloway v. Columbia Ins. Co.* 8 Gray, 199; *Blackstone Manuf. Co. v. Blackstone*, 13 Gray, 488; *Moody v. Gay*, 15 Gray, 457; *Crompton v. Anthony*, 13 Allen, 33; *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400, 406; *Smith v. Mutual Ins. Co.* 14 Allen, 336, 339, 340; *Carver v. Peck*, 131 Mass. 291; *Kansas & Eastern Railroad Construction Co. v. Topeka, Salina, & Western Railroad*, 135 Mass. 34, 39; *Desper v. Continental Water Meter Co.* 137 Mass. 252; *Ager v. Murray*, 105 U. S. 126; *Howell v. Chicago & North Western Railway*, 51 Barb. 378, 383; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349.

F. T. Benner, for the plaintiff.

FIELD, J. It was agreed at the argument that the bill should be taken to mean that the defendant is a corporation organized under the laws of the State of Maine, and has a usual place of business in Boston in this Commonwealth, and that the papers show that it had appointed in writing the commissioner of corporations to be its attorney, upon whom process against it might be served pursuant to the St. of 1884, c. 330, § 1, and that by

Commonwealth, shall, before doing business in this Commonwealth, appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in this Commonwealth. A copy of the writing, duly certified and authenticated, shall be filed in the office of the said commissioner, and copies certified by him shall be deemed sufficient evidence thereof. Service upon such attorney shall be deemed sufficient service upon the principal."

its attorney in the suit it had accepted service "to the same extent that the plaintiff would have obtained service by leaving a copy of this writ with the commissioner of corporations."

There is no doubt, under the agreement made by the corporation in accordance with this statute for the purpose of enabling it to do business within the Commonwealth, that "so long as any liability remains outstanding against the company in this Commonwealth" the service made in this cause is sufficient to enable the court to render a personal judgment against the company which would be held valid in other jurisdictions as well as in this. *Lafayette Ins. Co. v. French*, 18 How. 404. *Ex parte Schollenberger*, 96 U. S. 369. *St. Clair v. Cox*, 106 U. S. 350. *National Bank of Commerce v. Huntington*, 129 Mass. 444. *Johnston v. Trade Ins. Co.* 132 Mass. 432.

Even if a court of equity may in its discretion refuse to entertain a suit brought against such a foreign corporation to collect a debt, particularly when the plaintiff is a non-resident, it would not decline to take jurisdiction when the plaintiff is an inhabitant of the Commonwealth, and the debt is the result of a contract which was made here and was to be performed here. See *Pierce v. Equitable Assurance Society*, 145 Mass. 56.

In *Carver v. Peck*, 131 Mass. 291, it was decided that letters patent of the United States were not property "within this State," in the sense in which these words were used in the Gen. Sts. c. 113, § 2, cl. 11, now the Pub. Sts. c. 151, § 2, cl. 11. The St. of 1884, c. 285, was thereupon enacted, providing that a bill in equity for the purpose described in that clause of the statutes might be maintained, notwithstanding the fact that "the property sought to be reached and applied is in the hands, possession or control of the debtor independently of any other person, or that it is not within the State." This statute was intended, we think, to extend the jurisdiction in the case of all debts, at least as far as courts of equity of general jurisdiction have carried it, when the debt is a judgment obtained at law. It may be assumed that the intention of the statute is to reach only such property as, from its nature, cannot be attached or taken on execution at law, and that neither under the statute nor under the general jurisdiction can a bill be maintained here to reach property situated wholly beyond the limits of the Commonwealth

which can be attached or taken on execution in a suit at law brought where the property is.

Letters patent are property of such a nature that they cannot be attached or taken on execution in a suit at law anywhere, and it must be considered as established that they can be reached by a creditor under an equitable process like this. *Ager v. Murray*, 105 U. S. 126. The rights secured by letters patent of the United States exist in Massachusetts in the same manner as in Maine, or in the rest of the United States. They are intangible property, and, so far as they have any *situs*, it is that of the residence or domicile of the owner. It is not denied that, since the passage of the St. of 1884, c. 285, if the defendant is a domestic corporation or an inhabitant of the Commonwealth, letters patent can be reached by this process. The argument is, that these letters patent cannot be applied to the payment of the plaintiff's debt except by an assignment, and that, as the defendant is a foreign corporation, it cannot be compelled in this suit to assign the letters patent either to the plaintiff or to any one else.

It does not now appear that the defendant will refuse to perform any decree which the court may make, or that the means which the court possesses of enforcing its decrees will not be adequate if it does refuse. For the purpose of collecting a debt, this corporation must be considered as having its residence in this Commonwealth, and the letters patent are within its control. *Lafayette Ins. Co. v. French*, 18 How. 404. It is the duty of the corporation to perform any decree which the court may make in the suit, because the corporation is subject to the jurisdiction of the court. As the court has jurisdiction of both the person of the defendant and of the subject, it is no reason for dismissing the bill that the defendant may possibly avoid performing the final decree. This may happen in every personal suit when the property of the defendant is such that it cannot be seized and put into the custody of officers of the law. It is premature now to consider all the remedies which the plaintiff may have if he obtains a decree and the defendant refuses to perform it. *Pingree v. Coffin*, 12 Gray, 288, 305. *Pierce v. Equitable Assurance Society*, 145 Mass. 56, 63.

Demurrer overruled.

CHARLES LINNEHAN vs. NATHAN MATTHEWS.

Suffolk. February 1, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Building Contract — Order — Case Stated — Motion to discharge.

In an action by the payee against the acceptor of an order, payable when the drawer had completed a building under a contract between the acceptor and himself to a certain point, and given in payment of building material, it appeared that the contract was cancelled before that point was reached because of the drawer's inability to perform it, and that the acceptor finished it at a cost greater than the amount that would have been due the drawer had he completed it. *Held*, that the order never became payable, and that the action could not be maintained.

A motion to discharge an agreed statement of facts was overruled, on the grounds that the material facts were not obscure and contradictory, as alleged, and that there was no competent evidence of fraud such as was set up.

CONTRACT against the defendant as acceptor of certain orders drawn by John F. Mead to the order of the plaintiff, and given in payment of building materials furnished and to be furnished by him to Mead, who was erecting a building under a contract, dated March 1, 1882, between the defendant and himself. The case was submitted to this court on an agreed statement of facts, which was filed on April 18, 1888. The case came on for argument in January, 1889, when the plaintiff for the first time filed a motion to discharge the agreed facts. The material facts appear in the opinion.

L. M. Child, for the plaintiff.

F. W. Kittredge & N. Matthews, Jr., for the defendant.

FIELD, J. The declaration is on three orders drawn by one Mead to the order of the plaintiff on the defendant and accepted by him. The first order is dated May 13, 1882, for \$1,000, payable "when a building now being erected by me on Huntington Avenue is plastered according to plans and specifications," etc., and "when I have completed my contract of March 1, 1882, . . . to this point." The second order is dated May 31, 1882, for \$1,500, payable "when the standing finish is up," etc., and "when I have completed my contract . . . to this point." The

third order is dated July 15, 1882, for \$1,000, payable when the building "is plastered according to plans," etc., and "when I have completed my contract . . . to this point."

It is agreed that Mead ceased to work on the building in the middle of September, 1882, and that then the roof was not on, the walls were only partially erected, the fifth floor was not on, and the mason-work not up to the fifth floor, and that "no plastering was done, nor any part of the standing finish up." By the contract, the plastering was to be finished by April 1, 1883, and the building was to be completed by October 1, 1883, and \$10,000 was payable when the plastering, stucco-work, and cornices were finished, being the ninth proposed payment, and \$10,000 when the standing finish was completed and the doors and windows were put in, being the eleventh proposed payment. It is also agreed, that, "when Mead ceased work upon the building, no payment beyond the fourth payment, mentioned in said agreement of March 1, had become due, and the defendant had advanced under said contract all that was then due." The fourth payment in the agreement was "ten thousand dollars when the fourth floor is on and the mason-work up to said fourth floor completed." It is also agreed, that, "after Mead ceased work upon the building, the cost to complete the same was more than the amount that would have become due to Mead under said contract had he completed the same."

On October 28, 1882, Mead, Nathan Matthews, Jr., and the defendant executed an agreement, whereby Mead conveyed to Nathan Matthews, Jr. his interest in the land and in the building materials on the premises for \$3,500, and Mead and the defendant released each other from all liability arising from the contract of March 1, 1882, and thereupon the defendant proceeded to complete the building at his sole expense. It is also agreed, that Mead did no work upon the building after the middle of September, 1882, "having become wholly unable to prosecute the said work and to further complete the said contract of March 1, 1882, except as may be inferred from the instrument of October 28, 1882, hereinafter mentioned, the defendant not admitting that any inference can be drawn therefrom tending to prove Mead's ability to prosecute or complete the said contract." The agreement of October 28, 1882, recites

that Mead "now finds himself wholly unable to continue the prosecution of said building, and to complete the same as in said contract provided." And it is plain that no other inference can be drawn from said agreement. It thus appears that Mead never so far performed his contract that any of the orders became payable, and that the plaintiff cannot maintain an action upon the orders. *Newhall v. Clark*, 3 Cush. 376. *Somers v. Thayer*, 115 Mass. 163. *Farquhar v. Brown*, 132 Mass. 340. *Proctor v. Hartigan*, 143 Mass. 462.

The defendant is not liable, because the building contract was cancelled in consequence of the inability of Mead to perform it, and thereupon the defendant finished the building. *Newhall v. Clark*, 3 Cush. 376. *Duffield v. Johnston*, 96 N. Y. 369.

It is conceded by the defendant, that, if he had interfered by force, fraud, or collusion to prevent Mead from performing his contract, then he would be liable to the plaintiff in some form of action. *Newhall v. Clark*, 3 Cush. 376. No such facts appear in the agreed statement of facts, and no such cause of action is alleged in any count of the declaration; and because this contention is not open to the plaintiff on the agreed facts, he has moved that they be discharged. The first reason given for discharging the agreed statement of facts is, that "the case stated is obscure and contradictory, and requires a finding of what are the facts from the evidence stated." So far as the facts stated are material, we have not found them obscure or contradictory. The second reason is, that "an important question in this case is whether there was collusion between Mead and the defendant to deprive the plaintiff of his rights."

The agreed facts are signed by counsel, and were filed on April 18, 1888, and they raise no question of collusion between Mead and the defendant. The counsel for the plaintiff waited until January, 1889, before he made this motion, the case having been continued from the November session of 1888. From the affidavits submitted, we think that there is no probable ground for believing that the plaintiff's counsel signed the agreed statement of facts in consequence of any fraud practised upon him or his client, or from any mistake as to the meaning of the agreement, and there is no evidence contained in the affidavits tending to show any collusion between Mead

and the defendant; the only evidence is of statements made by Mead, which are inadmissible as evidence. The motion is denied. The entry must be *Judgment for the defendant.*

COMMONWEALTH vs. JAMES HAYES.

Norfolk. February 4, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Licenses — Limit of Number — Statute.

Under the St. of 1888, c. 340, proportioning to population the number of licenses that cities and towns may grant for the sale of intoxicating liquors, and providing that "any license granted contrary to or in excess of the provisions of this act shall be void," a license duly granted by a town after the act took effect is void if the number already issued by it and then in force exceeds or equals the number permitted by the act.

COMPLAINT on the Pub. Sts. c. 101, §§ 6, 7, for keeping a common nuisance from June 22 to August 28, 1888, in Randolph. At the trial in the Superior Court, before *Sherman, J.*, the defendant admitted that he made sales of liquor during the time covered by the complaint, and that, unless the following facts constituted a defence, he was guilty as charged.

In 1888 the town of Randolph, the population of which, as shown by the census of 1885, was three thousand eight hundred and seven, voted to grant licenses of the first five classes for the sale of intoxicating liquors. Fifteen licenses of the first class, numbered from one to fifteen, and six licenses of the fourth class, numbered from one to six, were granted and issued by the selectmen of the town, and were in force prior to June 14, 1888.

On June 14, 1888, the selectmen, upon an application filed by the defendant in May, and duly published, voted to grant to the defendant three licenses, one of the first class, another of the fourth class, and an innholder's license, and on the next day he received them from the town clerk. All the sales made by him were made in accordance with the terms of his licenses, and in good faith.

If the St. of 1888, c. 340,* was applicable, the defendant's licenses were in excess of the number limited by that statute. The defendant asked the judge to rule that the statute of 1888 did not apply, and that his licenses were valid. The judge refused so to rule, and instructed the jury that the act of 1888 did apply; that the licenses did not constitute a defence; and that they would be authorized to find a verdict of guilty.

The jury returned a verdict of guilty, and the judge reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, a new trial was to be granted.

R. O. Harris, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

FIELD, J. It is conceded that the St. of 1888, c. 340, went into effect on June 14, 1888. Pub. Sts. c. 3, § 1.† By the Pub. Sts. c. 100, § 5, a city at its annual municipal election, or a

* This statute, entitled, "An Act to limit the number of places licensed for the sale of intoxicating liquors," is as follows:

"Section 1. In all towns and cities which vote to grant licenses of the first five classes described in section ten of chapter one hundred of the Public Statutes, to sell intoxicating liquors, the number of places licensed for the sale of such liquors shall not exceed one for each one thousand of the population, as ascertained by the last preceding national or state census, except that in the city of Boston one such place may be licensed for each five hundred of the population. No more than one such place shall be licensed by any one vote of the licensing board; such licenses shall be numbered in regular order as granted, and any license granted contrary to or in excess of the provisions of this act shall be void: *provided* that, in towns having an increase of resident population during the summer months, the selectmen may, during the month of June, cause a census to be taken, and may grant one such license for each five hundred of said resident population, as ascertained by said special census, to take effect on the fifteenth day of June and to expire on the fifteenth day of September following; but no such license shall be granted unless the town at its last annual town meeting votes 'Yes' in answer to the question, 'Shall licenses for the sale of intoxicating liquors be granted in this town?'

"Section 2. The foregoing section shall not prevent the licensing of one place in any town voting for license whose population is less than one thousand. Approved May 15, 1888."

† This statute provides that an act, if it does not expressly prescribe the time when it shall go into operation, shall take effect on the thirtieth day next after the day on which it is approved.

town at its annual meeting, may vote to authorize the granting of licenses for the sale of intoxicating liquors of the first five classes, and the licenses so granted "shall continue in force until the first day of the May next ensuing, unless sooner forfeited or rendered void." By the St. of 1883, c. 98, the licensing board of any city or town may receive applications for licenses during the months of March and April, and may during the month of April grant licenses to take effect on the first day of the following month of May. The annual meeting of every town must be held in February, March, or April. Pub. Sts. c. 27, § 53.

It must have been known to the Legislature when the St. of 1888, c. 340, was passed, that the towns and cities in the Commonwealth had already voted upon the question whether licenses should be granted for the year beginning May 1, 1888, and that in those towns and cities which had voted "Yes" on this question many licenses had already been granted which, under the laws then existing, would continue in force until the first day of May, 1889, unless sooner forfeited or rendered void. It is conceded that licenses are not contracts, and that existing licenses might be annulled by an act of the Legislature, and that if the intention of the St. of 1888, c. 340, was to annul all licenses existing when it went into effect, then, so far as appears from the report, the defendant's was the first and only license granted under the St. of 1888, c. 340, and was valid.

The general rule undoubtedly is, that statutes are to be considered as prospective only in their operation, unless they are expressly made retroactive, or unless it is necessary to construe them as retroactive in order to give effect to their provisions. *North Bridgewater Bank v. Copeland*, 7 Allen, 139. *Shallow v. Salem*, 186 Mass. 136.

It is one contention of the counsel of the defendant that the statute was intended to regulate the granting of licenses for the year beginning May 1, 1889, and the subsequent years, and not for the remainder of the year beginning May 1, 1888, and that it must be construed as if the first clause read "for all towns and cities which hereafter vote to grant licenses," etc.

The attorney for the Commonwealth contends that in passing this statute it was not the intention of the Legislature either to

postpone the operation of the statute until the next licensing year, or to annul all licenses which had been previously granted for the current year; that the statute should be applied to the facts as they existed in each city and town at the time it took effect; and that if at that time the number of places lawfully licensed in any city or town equalled or exceeded one for each thousand of the population, no license should thereafter be granted for that year, because, if granted, it would be "in excess of the provisions of this act."

The clause of the statute which reads "No more than one such place shall be licensed by any one vote of the licensing board, such licenses shall be numbered in regular order as granted, and any license granted contrary to or in excess of the provisions of this act shall be void," plainly relates to licenses granted after the act took effect, and we are of opinion that, in determining whether a license thereafter granted is "in excess of the provisions of this act," licenses lawfully granted for the current year before the act took effect, and not otherwise forfeited or rendered void, must be counted. Such a construction neither renders the act retroactive, nor postpones the operation of it beyond the time when it took effect. As the license under which the defendant justified was granted after the act took effect, and as the licenses previously granted and in force for the current year exceeded the number permitted by the act, the defendant's license was void. *Judgment on the verdict.*

COMMONWEALTH vs. LORENZO T. BROWN.

Norfolk. February 4, 1889. — March 2, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Common Nuisance — Confession — Evidence.

At the trial of a complaint against a retail druggist, on the Pub. Sts. c. 101, §§ 6, 7, for keeping a common nuisance, there was evidence of an admission by him to an officer that he was guilty of the offence charged before he received a license; and that thereafter he illegally sold intoxicating liquors. The presiding judge instructed the jury that frequent illegal sales by the defendant

would be competent evidence of his guilt, and, as to the confession, that they must be satisfied beyond a reasonable doubt that the officer correctly heard and understood the language used, and honestly and truly reported it in court. *Held*, that the defendant had no ground of exception.

An instruction to the jury, that "proof of merely one sale of intoxicating liquors in a tenement is not sufficient evidence of the keeping and maintaining such tenement as a common nuisance," was *held* to be rightly refused, in the absence of facts in evidence raising that question.

COMPLAINT to the District Court of East Norfolk for keeping and maintaining a common nuisance, to wit, a tenement in Weymouth used for the illegal sale and keeping for sale of intoxicating liquors, from July 1, 1887, to April 8, 1888.

At the trial in the Superior Court, on appeal, before *Sherman, J.*, it was admitted that, on December 6, 1887, the defendant, a druggist, was granted a license of the sixth class, to expire on May 1, 1888. One Gardner and one Geary, police officers, testified that they went to the store of the defendant with the complaint, about April 20, 1888, and told him that the offence charged was for keeping a common nuisance during the time alleged, and read the complaint to him, and that the defendant then said, "It is not fair to go back of my license,—if you do, I am guilty, for all the druggists in Weymouth sold before licenses were granted on December 6, 1887." The government introduced evidence tending to show that the defendant, after December 6, 1887, sold intoxicating liquor to be drunk as a beverage, although in each instance the purchaser signed a certificate to the effect that he intended to use the liquor for medical purposes.

The defendant requested the judge to rule: "1. That evidence of verbal confessions made to officers is to be received with great caution. 2. That unless the government has proved that the defendant kept the tenement as a liquor nuisance before he received his license and after May 1, 1887, the defendant could not be convicted for so keeping the tenement during that time, even if they should find that the defendant did say to the officers that he was guilty, and that every druggist in Weymouth was guilty of selling liquor before the license; as such confession, if proved, would be insufficient evidence for the defendant's conviction of keeping a liquor nuisance before said December 6. 3. That proof of merely one sale of intoxicating liquor in a tenement is not sufficient evidence of

the keeping and maintaining such a tenement as a common nuisance."

The judge refused so to rule, and instructed the jury among other things as follows: "The government claim that the defendant has admitted his guilt of so keeping said store between July 1 and December 6, 1887. You have heard the testimony of officers Gardner and Geary concerning the declaration alleged to have been made by the defendant on April 20th, and the testimony of the defendant and his witnesses in denial. The question of fact then is, Did the defendant say, in reply to the charge of keeping a common nuisance, 'It is not fair to go back of my license, — if you do, I am guilty, for all the druggists in Weymouth sold before December 6, 1887'? Whenever witnesses attempt to give evidence of a conversation, a confession, you must be satisfied that they correctly heard and understood the language used, and have honestly and truly reported it in court. If you are satisfied beyond a reasonable doubt that on April 20th the defendant, after hearing the complaint read and knowing what the charge against him was, and in reply to it made use of the language testified to by the officers, and are also satisfied that the same evidence was given in the court below, you may consider the evidence as evidence in the case, giving it such weight, and only such weight, as you think it is fairly entitled to. If said language was not used, or was not given in evidence in the court below, you will dismiss it entirely from your minds and disregard it. . . . If . . . you are satisfied beyond a reasonable doubt that the defendant made frequent sales of intoxicating liquor upon certificates claiming that such sales were for medical purposes, and at and before the sales the defendant knew that said certificates were false, and that the purchasers did not intend said liquors for medical purposes, but in fact wanted and intended the same for use as a beverage, then such sales would be unlawful and in violation of his license, and the evidence would be competent for your consideration in determining whether or not the defendant is guilty of keeping and maintaining a common nuisance, under the instructions which I have given you."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

FIELD, J. The complaint is for keeping and maintaining a tenement used for the illegal sale and the illegal keeping for sale of intoxicating liquors, from July 1, 1887, to April 18, 1888. The defendant on December 6, 1887, received a license of the sixth class for the year ending May 1, 1888. The confession put in evidence related solely to sales made before the license was granted, and was the only evidence of sales made between July 1 and December 6, 1887.

The counsel for the defendant has argued but two questions: first, whether the evidence of the confession was sufficient to warrant the jury in finding the defendant guilty of maintaining the alleged nuisance before December 6, 1887; and secondly, whether proof of "merely one sale" would support the complaint. As the jury may have found the defendant guilty of maintaining the nuisance before December 6, 1887, and not afterwards, the instructions in regard to the confession are material. The facts in evidence do not raise the question whether proof of merely one illegal sale of intoxicating liquors in a tenement, without any other evidence of an illegal keeping or of illegal sales of such liquors in the same tenement, would warrant a verdict of guilty on a complaint under the Pub. Sts. c. 101, §§ 6, 7.

The instructions given upon the evidence, apart from that of the confession, were, in substance, that frequent illegal sales by the defendant would be competent evidence on which he might be found guilty, and the evidence of the confession was to the effect that the defendant admitted that he was guilty of the offence charged in the complaint before he received a license, and not that he admitted that he had made but one sale. The instructions given upon the weight to be given to the evidence of the confession were substantially in accordance with the decisions in *Commonwealth v. Galligan*, 118 Mass. 202; *Commonwealth v. Sanborn*, 116 Mass. 61; and *Commonwealth v. Christie*, 145 Mass. 232.

Exceptions overruled.

LEONIDAS BALCH vs. EBEN F. STONE.

Essex. November 7, 1888. — March 5, 1889.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

Statutes of Distribution — Descent of Real Estate.

Under the Pub. Sts. c. 125, § 1, cl. 1 and cl. 5, relating respectively to the descent of the real estate of an intestate, in default of children or surviving brothers or sisters, to his lineal descendants, or to the issue of such deceased brothers and sisters, and providing that "if all such descendants" (or issue) "are in the same degree of kindred to the intestate they shall share the estate equally; otherwise, they shall take according to the right of representation," — the nearest descendants or issue in equal degree of kindred to the intestate are to take *per capita*, and those in more remote degree *per stirpes*.

CONTRACT to recover a distributive share of an estate. The case was submitted to the Superior Court on an agreed statement of facts, in substance as follows.

In February, 1887, John Stone, of Newburyport, a bachelor, died intestate, leaving at the time of his decease neither father nor mother, nor brother, nor sister, but eighteen nephews and nieces, and five grand-nephews and grand-nieces, and two great-grand-nieces, the issue of four deceased brothers and sisters of the intestate. The defendant has in his hands, derived from the sale of certain real estate in Newburyport, which was the property of John Stone at the time of his decease, and which he holds as the agent of his heirs at law, thirty-five hundred dollars, less the expenses of said sale, to wit, thirty-two dollars; the plaintiff's share whereof the defendant is ready to pay.

The plaintiff contended that his part thereof, as one of the heirs, is one twenty-first part, amounting to one hundred and sixty-five dollars and fourteen cents; but the defendant contended that the share of the plaintiff, who is a nephew of the intestate, is one ninth of one fourth, or one thirty-sixth part, amounting to ninety-six dollars and thirty-three cents.

The Superior Court ordered judgment for the plaintiff for the larger sum; and the defendant appealed to this court.

F. Brewster, (*W. D. Northend* with him,) for the plaintiff.

E. F. Stone, (*N. N. Jones* with him,) for the defendant.

MORTON, C. J. This case depends upon the construction of the fifth clause of the first section of our statute of distribution, which provides that the estate of a person who dies intestate shall descend, "If he leaves no issue and no father or mother, then to his brothers and sisters, and to the issue of any deceased brother or sister by right of representation; and, if there is no surviving brother or sister of the intestate, then to all the issue of his deceased brothers and sisters. If all such issue are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation." Pub. Sts. c. 125, § 1, cl. 5.

If we regard merely the grammatical construction of this provision, the more obvious meaning would seem to be that where an intestate leaves nephews and nieces, and also grand-nephews or grand-nieces, the nephews and nieces who are his next of kin would take *per stirpes* and not *per capita*. The pronoun "they" following "otherwise" has no antecedent directly expressed, except "all such issue," and if this is controlling, it would follow that all such issue must take according to the right of representation. But upon a consideration of the context, and of the history of the legislation upon the subject and of the spirit which pervades it, we are convinced that we cannot adopt this construction without defeating the intention of the Legislature.

The provision in its present form was first enacted by the St. of 1880, c. 219. It was clearly the purpose of this statute to extend the provisions of the first clause, which apply to lineal descendants, to collateral relations. The words used are precisely the same, *mutatis mutandis*: "If all such descendants," or issue, "are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation." It is clear that this provision in both clauses must receive the same construction. The question in this case is the same as would arise if a man died intestate, leaving as his descendants several grandchildren and also some great-grandchildren, the children of a deceased grandchild of the intestate. Should such grandchildren take *per stirpes* or *per capita*? The provision we are considering relating to lineal descendants has been in force in substantially

the same words since the year 1805. Pub. Sta. c. 125, § 1, cl. 1. Gen. Sta. c. 91, § 1, cl. 1. Rev. Sts. c. 61, § 1, cl. 1.

The statute of 1805 provides, in substance, that if a man dies intestate his estate shall descend to his children and the lawful issue of any deceased child by right of representation; if he leaves no issue, to his father; if he leaves no father, to his mother and his brothers and sisters and the children of any deceased brother or sister by right of representation, and if he leaves no issue, father, brother, sister, or mother, then to his next of kin in equal degree, "provided further that, when the issue or next of kin to the intestate who may be entitled to his estate by virtue of this act are all in the same degree of kindred to him, they shall share the same estate equally; otherwise, they shall take according to the right of representation." St. 1805, c. 90, § 1.

In the case of *Sheffield v. Lovering*, 12 Mass. 490, decided soon after the passage of this statute, Mr. Justice Jackson, in delivering the opinion of the court, says: "The chief object of the Legislature in this statute, which is understood to have been prepared by the late Chief Justice Parsons, seems to have been, not to establish new rules of descent and distribution, but to adopt and confirm, in clear and explicit language, the legal construction which had been given to the preceding statutes, and which had been considered the law of the country for more than a century." In regard to the proviso above cited in the statute of 1805, Mr. Dane says that "the last proviso in the first section is according to the former construction." Dane's Abr. c. 126, art. 1, § 13.

We are justified in assuming that the statute of 1805 was not intended to change the former laws, but was a re-enactment of them. Looking back at these laws, we find that the St. of 1788, c. 36, which was a substantial re-enactment of the laws of the Colony and Province, provides that, if a man dies intestate, his estate shall descend in equal shares to and among his children and such as shall legally represent them (if any of them be dead), except that the oldest son shall have two shares, "and in every case where children shall inherit by representation, it shall be in equal shares; and where there are no children of the intestate, the inheritance shall descend equally to the next of kin

in equal degree, and those who represent them, computing by the rules of the civil law, no person to be considered as a legal representative of collaterals beyond the degrees of brothers' and sisters' children." St. 1783, c. 36, § 1.

It is clear that under this statute, if a man died leaving no children but leaving several grandchildren, and also some great-grandchildren, the issue of a deceased grandson, the grandchildren being in equal degree of kindred to the intestate, would take an equal share *per capita*, and the great-grandchildren would take by representation the share which their father would have taken if living at the death of the intestate. We are of opinion that in the statute of 1805, and in the several revisions of the statutes which have since taken place, it was not the intention of the Legislature to change this rule of descent. The policy of our laws is that heirs or next of kin who are in equal degree of kindred to the intestate inherit *per capita* in equal shares, while those in a more remote degree take *per stirpes*, or such portion as their immediate ancestor would inherit if living. *Knapp v. Windsor*, 6 Cush. 156, 162. *Snow v. Snow*, 111 Mass. 389.

There seems to be no reason for departing from this established policy of equality among the next of kin, and we cannot, unless we are compelled by irresistible reasons, believe that the Legislature intended to destroy this equality among next of kin who are living, because one who would if living be in equal degree of kindred with them happened to die before the intestate, leaving children.

The difficulty in construing the statute arises from the uncertain meaning of the last clause, "otherwise, they shall take according to the right of representation." This provision, which is the same in both clauses, contemplates and was intended to provide for the case where there are some descendants or issue who are of more remote degree of kindred than others who are living, such as where there are grandchildren and great-grandchildren, or nephews and grand-nephews. The purpose is to provide that they shall take by representation, and we think the meaning is the same as if it read, "otherwise," (that is, if there are some descendants or issue of a more remote degree,) "they shall take according to the right of representation."

Section 6 of the same chapter provides that "Inheritance or succession by right of representation shall be deemed to take place when the descendants of a deceased heir take the same share or right in the estate of another person that their parent would have taken if living." Pub. Sts. c. 125, § 6. Now, if the ground taken by the defendant be correct, that, when there are descendants or issue of unequal degree, the nearest descendants or issue who are living are to take *per stirpes* and not *per capita*, the more remote issue could not take by representation as defined by the statute. If the estate is divided *per stirpes*, they would get a different share from that which their parent would have taken if living. There are grammatical and technical difficulties in the way of either construction, but looking at the history and spirit of our legislation we are of opinion that it was the intention of the first clause to provide that, if a man leaves no children, his estate shall descend to all his descendants; all such living descendants as are in equal degree of kindred to take an equal share, that is, *per capita*; and if there are more remote descendants, they shall take the share which their parent would have taken if living. It was not intended that the rule of representation shall apply to those who were nearest descendants in equal degree, but only to those who are descendants in a more remote degree. This maintains the principle of equality among all descendants of the same degree, living and dead, and gives to the more remote descendants exactly the same share which their parent would be entitled to if living.

As we have before said, the fifth clause must receive the same construction as the first, and it follows in the case at bar that the plaintiff is entitled to recover one twenty-first part of the fund in the hands of the defendant.

Judgment affirmed.

BOSTON BELTING COMPANY *vs.* CITY OF BOSTON.

Middlesex. November 14, 15, 1888. — March 5, 1889.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

*Boston — Improvement of Stony Brook — Action — Statutory Remedy —
Arbitrament and Award — Negligence — Nuisance.*

The St. of 1874, c. 196, § 1, authorized the city of Boston to improve Stony Brook, and § 2 gave a remedy to "any person injured in his property by any of the acts" of the city in so doing, while § 9 contained a proviso that the statute should not be construed to "authorize any interference with the estate owned" by a corporation on the brook, or with "its rights in said brook as to the use and purity of its waters." The corporation brought an action to recover, in certain counts, for damage caused by the setting back of water upon its premises from the negligent manner in which the city did the work below its estate, and, in another count, for that resulting from a scarcity of water during a portion of the year, owing to the changes made above its estate; and referees made an award to the corporation in a gross sum for both kinds of damage. *Held*, that the city was liable for the setting back of water due to its negligence, but that, in the absence of evidence that the scarcity was due to any negligence on its part, the referees had no power to assess damages therefor; and that the award, as it afforded no means of determining the amount assessed for the latter damage, must be set aside.

MORTON, C. J. This is an action of tort. The declaration contains eight counts. The first seven counts are for similar causes of action occurring in different years. Each alleges in substance that the plaintiff owned land and buildings on Stony Brook, and was entitled to the natural and usual flow of its waters; that the city of Boston, acting under the St. of 1874, c. 196, undertook to alter, deepen, and widen the brook; that it did the work on the brook above the plaintiff's premises so negligently that the water poured down in large and unusual quantities; and that it negligently failed to provide and keep open sufficient channels and conduits to carry off the water into the sea, and that thus the water was set back upon the plaintiff's premises to its great injury. The eighth count alleges that the plaintiff, as owner on the brook, is entitled to the natural and usual flow of its waters; that it was the duty of the defendant, under the statute, to do the work so as not to interfere with the rights of the plaintiff; that the defendant, disregarding its duty,

so did the work as to cause the natural flow of the stream to be greatly increased at times, and to be greatly diminished at other times, causing a scarcity of water at the plaintiff's premises during a part of the year, to the injury of its business.

The case was referred by the Superior Court to three referees, who have returned an award in favor of the plaintiff in a gross sum for all damages proved. The referees found that the city of Boston did not make suitable provision below the works of the plaintiff to carry the water off to the sea, and that its failure to do so was improvident and improper, and constituted negligence on the part of the city; but that the plaintiff made no claim that any part of said works was constructed in an unskilful or unworkmanlike manner. They also found that the doings of the city above the plaintiff's works created an unnatural scarcity of water at the works during the summer months of each year, and they thereupon found for the plaintiff upon all the counts in a gross sum. It thus appears that their award includes damages, not only for the negligent construction of the work below the plaintiff's premises, but also for any injury caused to the plaintiff by the work above its premises, in regard to which no negligence is shown on the part of the city.

The St. of 1874, c. 196, in § 1, authorizes the city of Boston to take the control of Stony Brook and its tributaries, so far as they are within the limits of the city, and to remove obstructions, divert the water, alter the course, and deepen the channel, and for this purpose to take or purchase land not exceeding four rods in width on either side of the brook. Section 2 provides that, if any person is injured in his property by any of the acts done by said city under § 1, he shall apply to the board of aldermen, who shall assess his damages, and, if he is aggrieved by their estimate, he may apply for a jury, and have his damages assessed in the manner provided when land is taken in laying out highways.

Where a city or town is authorized by the Legislature to make a public improvement which must result in injury to the property of citizens, and the statute makes provision for ascertaining the damages for such injury under special proceedings, the remedy thus provided is exclusive of all others, and the

citizen cannot maintain an action at law for any injury which is within the scope of the remedy provided by the statute. But if injury is done which is not the necessary result of the public work authorized by the Legislature, but is caused by the unskilful and negligent manner in which the work is done, the person injured may maintain an action at law for such injury. These principles are recognized in many cases, of which it is necessary to cite only a few. *Perry v. Worcester*, 6 Gray, 544. *Washburn & Moen Manuf. Co. v. Worcester*, 116 Mass. 458. *Morse v. Worcester*, 139 Mass. 389.

Applying these rules to the case at bar, we are of opinion that the city is liable in this action for the injury caused by its delay in providing a sufficient outlet into the sea to carry off the water which, by its work upon the upper part of the stream, had been increased in volume beyond its natural flow. The referees have found that there are a number of streets which cross the stream above the plaintiff's works; that before the city entered upon the work there were small culverts under these streets; that the streets acted as dams, holding back the water in wet seasons; that the city enlarged the culverts so as to permit the water to flow down in excessive quantities, and made no provision to enlarge the outlet, or to keep the lower part of the stream unobstructed, so as to permit the excessive flow of the water to escape into the sea. This was a fault in the manner of performing the work authorized by the Legislature. A man of reasonable foresight and prudence would not begin such work by altering the upper part of the stream so as to enlarge the flow of the water beyond the capacity of its mouth, without first enlarging its outlet so as to be sufficient for the increased flow. The referees were justified in the finding that this was negligence which made the city liable in this action.

The defendant contends that the city is not liable for this or any other damage, because the fault, if any, was the fault of the plan of improvement adopted, and relies upon *Child v. Boston*, 4 Allen, 51, and several other similar cases, which hold that a city is not liable for any defect in the plan or system of sewerage built by order of the mayor and aldermen. But these cases go upon the ground that the mayor and aldermen in laying out

sewers act as an independent board of public officers, and that the city has no control over, and no responsibility for, the plan or system adopted; but they admit that it is responsible for any negligence in the performance of its duty properly to construct and maintain the sewers. These reasons for exempting the city from responsibility do not exist in the case at bar, and the cases have no application.

But we think different considerations apply in regard to the injury sustained by the plaintiff by reason of the occasional scarcity of water caused by the work done by the city upon the upper part of the stream. No negligence is shown in the manner of performing this work. It was done under the authority of and in accordance with the statute. It was impossible to carry out the object of the statute, and prevent the danger of inundations in time of freshet, except by enlarging the culverts and making changes in the upper part of the stream, of which the natural effect would be to cause a scarcity of water in dry times. Such scarcity is incidental to the accomplishment of the public work, and any injury caused by it is to be recovered in the manner provided by the statute, and not by a suit at law.

But the plaintiff contends that this case is an exception to the general rule, because of the clause in § 9 of the St. of 1874, c. 196, which provides that the act shall not be construed to "authorize any interference with the estate owned by the Boston Belting Company, or its rights in said brook as to the use and purity of its waters." The claim is that the city is not authorized by the statute to do any act which will in any manner injure or affect the rights of the plaintiff. We cannot adopt this construction. It would render the act entirely nugatory, and defeat wholly its object and purpose. The statute contemplates a great public improvement, necessary to prevent the damages caused by the occasional overflowing of Stony Brook. It must have been seen by the Legislature that, in order to accomplish its purpose, great alterations must be made in the brook, and that it would be impossible to make such alterations and yet have the water run through the plaintiff's land in the same manner as it did before. We cannot believe that it was the intention of the Legislature to annul the statute by the pro-

vision we are considering. Its purpose was, we think, to prevent the city from diverting the brook from the estate of the plaintiff, and from polluting the purity of the water above its estate. This construction makes it consistent with the other parts of the statute.

For these reasons we are of opinion that the referees had no right to award damages for the occasional scarcity of water caused by the work of the city, and we think this question was fairly raised before the referees by the second request of the defendant for rulings.* As their award furnishes no means of determining what amount of damages was awarded for this injury, it follows that the award must be set aside. Under these circumstances, the question whether the defendant has the right to have all the evidence before the referees reported probably becomes of no practical importance, and we do not discuss it.

A rescript will be sent to the Superior Court, directing that the award be rejected, and the future disposition of the case is within the control of that court.

Award rejected.

E. R. Hoar & W. G. Russell, (Samuel Hoar with them,) for the plaintiff.

A. J. Bailey, (R. W. Nason with him,) for the defendant.

* This request, which the referees refused, was based on the facts found by them and recited in the opinion, and was as follows: "2. That the city had authority in law to widen the culverts under the streets crossing Stony Brook in the manner shown by said facts, and is not liable in damages in this action for any injury caused to the plaintiff in the manner shown by said facts."

WINSLOW W. GUPTILL & another vs. JOHN L. AYER.

Suffolk. January 24, 1889. — March 5, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Trustee Process — Executor of Trustee — Scire Facias.

The executor of a person summoned as trustee in a trustee process represented the estate to be insolvent, and the Probate Court, after commissioners duly appointed to receive and examine claims had filed their report, issued an order for the distribution of the estate among the creditors proving their claims, and the executor duly made distribution. The plaintiff in the trustee process did not present any claim to the commissioners, but, after such distribution, took judgment against the principal defendant, and the testator was charged as trustee. The executor had no notice of the trustee process or of the claim until after a writ of *scire facias* was issued to charge him as trustee. *Held*, that the *scire facias* could not be maintained.

SCIRE FACIAS to charge as trustee the executor of the will of Joseph Kelley, who was summoned as trustee of Henry H. Packer in an action brought by the plaintiffs against Packer. Writ dated January 26, 1888. The answer was as follows:

"1. *Nul tiel record.*

"2. The defendant says that, as executor of the estate of said Kelley, he gave, in June, 1884, a bond for the faithful discharge of his trust; that this suit was not commenced within two years from the time of the giving of said bond, as required by Pub. Sts. c. 136, § 9; that therefore said defendant cannot be held to answer to plaintiffs' suit.

"3. The defendant further says, that said Kelley died June 2, 1884, after said original suit was begun, but before said trustee was charged, and before judgment in said suit was rendered; that letters testamentary were granted to said executor on June 23, 1884; that the estate of said Kelley was found to be insolvent, wherefore, on June 9, 1885, said executor represented to the judge of probate for the county of Suffolk the condition of said estate; that on June 15, 1885, a commission of insolvency issued to certain commissioners to receive and examine all claims against the estate of said Kelley, and to report thereon, all of which appears of record in the Probate Court for the county of Suffolk; that said commissioners gave due notice of

said commission, and received and examined all claims presented to them; that the plaintiffs did not so present their claim within six months after the appointment of said commissioners, as required by Pub. Sts. c. 137, §§ 9, 10; that no notice of any sort of this claim was ever given to said court or to said executor other than that given by this writ of *scire facias*; that on April 19, 1886, an order for distribution of said estate issued from said court, and a distribution made immediately by said executor, as therein directed, wherefore the said defendant cannot be held to answer to said suit.

"4. The defendant further says, that by virtue of Pub. Sts. c. 137, § 31, this suit cannot be maintained, it being brought after the representation of insolvency of said estate, and being for a demand in no way entitled to preference, and not being one that would not be affected by the insolvency of said estate, and the assets of said estate not proving sufficient to pay all claims allowed by said commissioners.

"John L. Ayer, executor, by his attorney, Fred. A. P. Fiske."

The plaintiffs demurred to the answer, and assigned for cause of demurrer, "that said answer, and each and every section thereof, and each and every defence therein attempted to be set up in manner and form as averred, is insufficient in law for the defendant to maintain any defence to the plaintiffs' writ."

The Superior Court sustained the demurrer; and the defendant appealed to this court. The facts appear in the opinion.

F. A. P. Fiske, for the defendant.

W. S. Rogers, for the plaintiffs.

MORTON, C. J. This case comes before us in an unusual manner. Our statutes contemplate that, in *scire facias* under the trustee process, the trustee shall answer under oath, and not by attorney; and his answers are to be taken as true, and if it appears from these that he has not in his hands any goods, effects, or credits of the principal defendant for which he is chargeable as trustee, he is entitled to judgment upon the *scire facias*. Pub. Sts. c. 183, § 53. *Fay v. Sears*, 111 Mass. 154. *Tryon v. Merrill*, 116 Mass. 299. *First National Bank of Clinton v. Bright*, 126 Mass. 535.

But as both parties desire to waive any questions of form, we have considered the case upon its merits. The material facts

are as follows. The plaintiffs in 1884 brought a suit against one Packer, in which one Kelley was summoned as trustee. Soon after the suit was brought, Kelley died, and the defendant was appointed executor under his will; the estate was found to be insufficient to pay all the debts, and in June, 1885, said executor represented the estate to be insolvent; thereupon commissioners to receive and examine claims were duly appointed, who returned their report into the Probate Court, and on April 19, 1886, the court issued an order for the distribution of the estate among the creditors who had proved their claims, and the executor made distribution according to the decree. The plaintiffs did not present any claim to the commissioners, but in October, 1887, they took judgment against Packer in the original suit, and the said Kelley was charged as trustee under the Pub. Sts. c. 183, § 57. The defendant had no notice of the plaintiffs' suit or claim until this writ of *scire facias* was issued.

The plaintiffs claim that they can maintain this suit under § 58 of the same chapter, which provides that, "if in the case last mentioned the executor or administrator does not voluntarily pay the amount in his hands, the plaintiff may proceed against him by a writ of *scire facias* as if the judgment in the first suit had been against him as trustee." This section must be construed in its connection with the other provisions of the same statute. Section 61 provides that, "when an executor or administrator is adjudged a trustee by reason of goods, effects, or credits in his hands or possession merely as such executor or administrator, whether in a suit originally commenced against him as trustee, or against the deceased testator or intestate, and whether the judgment is in the original suit or on a writ of *scire facias*, the execution shall not be served on his own goods or estate, nor on his person, but he shall be liable for the amount in his hands in like manner and to the same extent only as he would have been liable to the defendant if there had been no trustee process." This is in accordance with the general policy of our laws relating to the trustee process, which intend to give to the attaching creditor only the rights which the defendant has, and not to enlarge the liability of the alleged trustee.

It is clear that, upon the facts of this case, the original defendant Packer has no claim against the defendant which he can

enforce. His only remedy was to prove his debt before the commissioners, and take his dividend. The defendant has not in his hands any amount for which he is liable to the defendant Packer. He has distributed under a decree of the Probate Court all the estate of his testator. It follows that he cannot be charged as trustee in this suit. *Patterson v. Patten*, 15 Mass. 473. It has been held that, where a person charged as trustee becomes insolvent and is discharged, neither he nor his assignee can be held as trustee either in the original suit or upon *scire facias*. *Pingree v. Hudson River Ins. Co.* 10 Gray, 170. *Hulbert v. Branning*, 15 Gray, 534. Similar reasons apply in the case where the estate of a deceased trustee is declared insolvent.

The remedy of the plaintiffs, if any, was to present the claim of the original defendant to the commissioners, and thus, perhaps, by virtue of the lien acquired by their attachment, they might hold the amount of the dividend payable to him, but having neglected to do this, the trustee suit must fail. *Rollins v. Robinson*, 35 N. H. 381, 382.

Demurrer overruled, and judgment for defendant.

CAROLINE CARSON vs. CORNELIUS T. DUNHAM.

Suffolk. January 28, 1889. — March 5, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Equity Jurisdiction — Injunction — Suit in another State.

This court will not restrain the prosecution of a suit between citizens of this Commonwealth, pending in a court of another State which has jurisdiction of the subject matter and of the parties, on the ground that the decision of such court may differ from that of this court or from that of other courts of equal authority.

BILL IN EQUITY to enjoin the defendant, a citizen of this Commonwealth, from prosecuting a suit brought by him against the plaintiff, also a citizen of this Commonwealth, on August 11, 1886, in a court of South Carolina, to foreclose a mortgage of

land in that State. Hearing before *W. Allen, J.*, who reported the case for the consideration of the full court. The material facts appear in the opinion.

S. Bartlett & R. D. Weston-Smith, for the plaintiff.

J. F. Wiggan, (*B. M. Fernald* with him,) for the defendant.

MORTON, C. J. This court has, without doubt, the power to restrain a citizen of this Commonwealth, who is personally within its jurisdiction, from prosecuting a suit in the courts of a sister State or a foreign country, when justice and equity require it.

In *Dehon v. Foster*, 4 Allen, 545, and 7 Allen, 57, the court, at the suit of the assignees of an insolvent debtor, enjoined a citizen of this Commonwealth from prosecuting a suit in Pennsylvania against the debtor, in which his property was attached, because the effect of allowing the suit to go to judgment would be to give the attaching creditor a preference over the other creditors, and to defeat the operation of the insolvent law. The doctrine of this case was reconsidered and reaffirmed in *Cunningham v. Butler*, 142 Mass. 47. Both of these cases proceed upon the ground, as stated by Mr. Justice Devens, that "the act of the defendants, in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tends directly to defeat the operation of the insolvent law in its most essential features, to prevent a portion of the property of the debtors from coming to the assignees to be equally distributed among their creditors, and to obtain a preference for themselves; that the defendants, being citizens of this State, were bound by its laws, and could not be permitted to do any acts to evade or counteract their operation, the effect of which would be to deprive other citizens of rights which those laws were intended to secure."

But the general rule is, that, where a case may be brought in either of two tribunals, that court which first obtains jurisdiction of the case retains it; and this extends, upon principles of comity, to cases of conflicting suits brought in the courts of sister States. This court, in the exercise of its judicial discretion, will not restrain the prosecution of such a suit unless a clear equity is made out, requiring the interposition of the court to prevent a manifest wrong and injustice, or a clear waiver of our laws which should govern the rights of the parties.

In the case at bar the defendant, Dunham, brought a suit in a court of competent jurisdiction in the State of South Carolina, to foreclose a mortgage upon a plantation called Dean Hall, situated in that State. The history of the mortgage is as follows. William A. Carson, who owned Dean Hall, died in 1856, leaving a widow, the plaintiff in this suit, and two children. He appointed Robinson and Blacklock his executors, with authority to sell the property, and to hold the proceeds in trust for his widow and children. In 1857 the executors sold Dean Hall to one Ball, and took his bonds for \$35,000, secured by a mortgage of the plantation, most of which they held in trust for the widow and children. On May 7, 1863, Ball sold the property to Hyatt, McBurney, and Company, and Robinson, acting in the absence of his co-executor, received payment of the said bonds of Ball in Confederate treasury notes. On May 8, 1863, Hyatt, one of the partners, sold to his copartners his interest in the firm of Hyatt, McBurney, and Company, and took, as part of the consideration, a mortgage for \$40,000 on Dean Hall. In July, 1886, the executrix of Hyatt assigned the said mortgage to Dunham, who, in August, 1886, brought the suit to foreclose it in the South Carolina court, as above stated. No personal service upon Mrs. Carson was made, but she appeared by counsel and defended the suit, "setting up as a defence all the facts alleged in the present bill."

If these were all the facts, it would seem to be clear that there was no ground for claiming that this court could properly interfere by injunction to restrain Dunham from prosecuting his suit. He had the right to bring his suit in the State court. A suit to foreclose the mortgage could only be brought in South Carolina. The land mortgaged is there, and most of the contracts which affect the rights of the parties were made there. The tribunals of that State, whose laws govern the title to the real estate and the interpretation of the contracts, are the appropriate tribunals to determine the rights of the parties.

But it further appears that, in 1866, Mrs. Carson, to whom her children had assigned all their interest, brought a bill in equity in the Circuit Court of the United States for the District of South Carolina against McBurney and others, but in which Hyatt was not made a party, in which the prayer was that the

bonds given by Ball might be declared valid and subsisting securities, and the mortgage to secure the same a subsisting lien on Dean Hall. The case went to the Supreme Court of the United States, and in that court a decree was rendered in favor of Mrs. Carson, as prayed for. *McBurney v. Carson*, 99 U. S. 567. In 1879 the executrix of Hyatt brought a suit to foreclose the mortgage to him in the State court of South Carolina. Mrs. Carson filed a petition to remove the case to the Circuit Court of the United States. This petition was overruled, and the Supreme Court of South Carolina, upon an appeal, sustained the jurisdiction of the State court, and rendered judgment for the plaintiff. *Hyatt v. McBurney*, 15 S. C. 398, 398, and 18 S. C. 199. Mrs. Carson took a writ of error to the Supreme Court of the United States, and also an appeal from a judgment of the Circuit Court refusing to remove the case. The Supreme Court decided that the Circuit Court had jurisdiction, and remanded the case for trial there; after which the case was dismissed upon motion of the plaintiff, and without any hearing upon the merits. See *Carson v. Hyatt*, 118 U. S. 279; and *Carson v. Dunham*, 121 U. S. 421.

The plaintiff in the suit before us contends that it thus appears that there is a difference of opinion between the Supreme Court of the United States and the Supreme Court of South Carolina upon the merits of the controversy between the parties; that the assignment to Dunham was colorable, and made for the purpose of enabling him to bring a suit in the State court which could not be removed to the United States court, and that these facts raise an equity in her favor which requires this court to enjoin Dunham from proceeding in his suit. It is the fair inference from the evidence in this case that Dunham desires to try his rights in the State court of South Carolina, because he supposes the decision will be favorable to him; and it is equally plain that Mrs. Carson is anxious to try her rights in the Supreme Court of the United States, or in this court, for the reason that she expects a decision in her favor. But it does not appear that the transfer to Dunham was merely colorable. The justice of this court who heard the case has found that Dunham "became the absolute owner of said bond and mortgage." This being so, it is immaterial what his motives were

for purchasing it. He had the right to enforce it in any competent tribunal. The Supreme Court of the United States has held that, even if the assignment to Dunham was colorable, it furnishes no ground for removing the case to the Circuit Court of the United States, and intimates that it is for the State court to decide whether this fact furnished any defence in the suit pending before it. *Carson v. Dunham*, 121 U. S. 421. *Provident Savings Society v. Ford*, 114 U. S. 685. *Oakley v. Goodnow*, 118 U. S. 43. But it is not necessary for us to consider what might be the effect of a merely colorable transfer, as it is found that the transfer to Dunham was valid, and not colorable.

We are then brought to the question, whether the fact, if it be a fact, that the Supreme Court of South Carolina entertains views of the law which governs the rights of the parties differing from those held by the Supreme Court of the United States justifies us in restraining Dunham from the further prosecution of his suit in the State court. The law gives the parties a choice of tribunals. Why is not Dunham's right to choose the South Carolina court as great as the right of Mrs. Carson to choose the United States court, or the courts of this Commonwealth? Reduced to its elements, the argument of the plaintiff is that we should interfere because there is danger that the Supreme Court of South Carolina will not rightly and justly decide the rights of the parties. We cannot yield to such an argument without a violation of every principle of inter-state comity. As we have said, the general rule of comity is that the court first acquiring jurisdiction shall retain it. In our judgment, it would be indefensible for the courts of this Commonwealth to restrain the prosecution of a suit pending in the court of a sister State, which has jurisdiction of the subject matter and of the parties, upon the ground that the decision of that court may differ from our own opinion, or from the decisions of other courts of equal authority. All the facts presented to us can be and are presented in the case pending in South Carolina, and it is presumed that the Supreme Court of that State will decide the case according to the law and the right.

For these reasons, without considering the merits of the controversy between the parties, we are of opinion that this bill cannot be maintained.

Bill dismissed.

MARY E. TALBOT vs. EMOGENE E. CHAMBERLAIN.

Worcester. October 28, 1888. — March 11, 1889.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Insane Person — Guardianship — Domicil — Probate of Will — Jurisdiction.

If an insane person, of sufficient mental capacity to change his domicil, in good faith removes his residence to another State pending proceedings here for the appointment of a guardian over him, and if his residence there continues until his death, and is assented to by his guardian after his appointment, he is such a resident of that State that its courts have jurisdiction of the original probate of his will.

W. ALLEN, J. This is an appeal, by Emogene E. Chamberlain, from a decree of the Probate Court of the county of Worcester, ordering to be filed a copy of an instrument proved and allowed in the State of Iowa as the will of Gardner W. Stone, upon the petition of Mary E. Talbot, his executrix. Several reasons of appeal are filed, but the only question open upon them is, whether the Iowa court had jurisdiction. If it had jurisdiction of the original probate of the will, questions of the capacity of the testator and of the execution of the will are concluded by its decree; if it did not have jurisdiction, the petition must be dismissed. *Crippen v. Dexter*, 13 Gray, 330. *Loring v. Oakey*, 98 Mass. 267. *Shannon v. Shannon*, 111 Mass. 331.

Stone's domicil at the time of his decease was either in Massachusetts or in Iowa. Unless it was in Iowa, the courts of that State did not have, and the courts of Massachusetts did have, jurisdiction of the original probate of his will. In January, 1886, his domicil was in Massachusetts, and the question is whether the facts offered to be proved by the petitioner are sufficient to show that it was changed to Iowa.

The facts in brief are, that Stone, while residing in the family of his daughter, the appellant, in Southborough, in this State, decided to remove his domicil to Atlantic, in the State of Iowa, where his only other daughter, the appellee, lived, and with that intention left Massachusetts and established his home in Atlantic. He twice visited Massachusetts for temporary purposes after

he took up his residence at Atlantic. He died at Chicago, while on his way back to Atlantic, after his second visit to this State. The only ground upon which it can be claimed that he did not acquire a domicil in Iowa is, that he was under guardianship in this Commonwealth as an insane person. In December, 1885, Stone formed and expressed to the appellant the intention to change his domicil to Atlantic. On the 5th day of January, 1886, in pursuance of that intention, he left his home in Southborough and attempted to take the cars there to go to Atlantic, but was forcibly prevented by a servant of the appellant, and held in duress until a complaint was made against him, on which he was committed to the lunatic hospital as an insane person. On the 20th day of January, while he was detained at the hospital, a petition was presented to the Probate Court for the appointment of a guardian over him as an insane person. He was held in custody at the hospital until after the hearing on the petition, which was on the 19th day of February, 1886. The case was continued, and on the 6th day of April, 1886, the decision was rendered, and a decree entered appointing a guardian. On the 20th day of February Stone was discharged from the lunatic hospital and from all restraint, and on the 24th day of the same month he went to the house of the appellant and took therefrom his goods and effects and shipped them to Atlantic, and himself started for Atlantic. He reached that place on the 27th day of February, and selected his home there, which he retained as his home until his death. He had, in fact, at that time, sufficient mental capacity to change his domicil. His guardian did not assume any custody or control of the person of Stone, and did not object to his living in Iowa, and on the occasion of one of Stone's visits to Massachusetts, his guardian, knowing that he claimed that his domicil was in Atlantic, and that he intended to return there, gave a portion of his property to him, and furnished him money for his return.

Assuming, as contended by the counsel for the appellant, that Stone could not, by changing his domicil, oust the court of this State of its jurisdiction to appoint a guardian over him; that the court had acquired jurisdiction and authority to make the decree; and that the decree related back to the commencement of the proceedings, and that Stone was affected by it, as if he

had continued to reside in this State,—the question is whether the decree prevented him from changing his domicile to Atlantic. Perhaps another statement of the question is whether it is possible that the national domicile of a person domiciled in this State, and under guardianship here as an insane person, can be changed. There is no pretence that in this case the domicile of the ward was changed by his guardian, and we have no occasion to consider whether the probate guardian of a lunatic can in any case establish a domicile for his ward outside of the State to which his authority is limited.

It is to be observed, that a change of national domicile by a ward can be only a change *sub modo*. It cannot affect his status as a person under guardianship in this Commonwealth, it cannot affect the legal authority of the guardian, or the disability of the ward. The decree of the court is conclusive as to everything within the scope of the guardianship. It is only as to matters outside of that that the courts will recognize the new foreign domicile, unless by comity. The only effect sought to be given to the change of residence in this case is upon the disposition of property after the death of the ward, and after the termination of the guardianship. So far as it affects the succession to property, the act of the ward in changing his domicile is no more inconsistent with, or prohibited by, the guardianship, than is his act in making a will. Both acts require competent mental capacity, and the decree of guardianship is not conclusive of the want of capacity to do either act. That decree does not fix the general status of the ward as a lunatic or an insane person, but only his local status as one under guardianship in this Commonwealth as an insane person, and is conclusive only in the domestic courts, and as to acts which the law requires to be done by the guardian and forbids to be done by the ward. *Leonard v. Leonard*, 14 Pick. 280. *Breed v. Pratt*, 18 Pick. 115.

The guardian of an insane person has by law the care and custody of the person of his ward, and it is argued that a person under restraint and in custody cannot be free to choose his own residence. The statute gives very general authority to all guardians of insane persons, and of spendthrifts alike, sufficient to meet the needs of any class or condition of wards, but the authority is to be exercised only as required by the condition,

or conduct, or circumstances of the ward. The statute does not make it the duty of every guardian to keep his ward in actual custody. It may be proper for a guardian to allow his ward to go from place to place without restraint, even beyond the limits of the guardian's authority. The law does not prohibit a guardian from allowing his ward to go beyond the limits of the State. The guardianship in this State cannot prevent the ward of sufficient mental capacity from acquiring a domicile, in fact, in another State, which will be recognized by other courts.

The question is, how far will such foreign domicile be recognized by our courts. The consent of the guardian, expressed or implied, may be required by the domestic courts, as the ward who removes without such consent might be held by such courts to be in the position of one escaping from lawful authority; but when the ward, of sufficient mental capacity to change his domicile, is permitted by his guardian to remove from this State, and does in fact acquire a new residence in another State or country, we see no reason that our courts should not recognize the foreign domicile, except so far as it affects the relation of guardian and ward within this jurisdiction. To hold otherwise would be to preclude a person under such guardianship from acquiring a foreign domicile for any purpose. We know of no authority which sustains that position.

While there is a marked distinction between the change by a guardian of his ward's municipal and of his national domicile, the same distinction does not seem to exist in the case of a change by the ward with the assent of the guardian. If the ward had mental capacity to abandon his domicile and acquire a new domestic domicile, he has capacity to acquire a new national domicile. That a new municipal domicile can be so acquired by a ward, with the assent of his guardian, sufficient to give jurisdiction for the probate of a will, was decided in *Culver's appeal*, 48 Conn. 165. The objection to a change of the national domicile of his ward by a guardian, that the acquisition of the new domicile requires an act in its forum where the guardian has no authority to act, does not apply when the ward has capacity to acquire for himself a new domicile. The abandonment of the domestic domicile by the guardian for the ward, or by the ward with the assent of the guardian, and the adoption of the foreign

domicil by the ward, must work a change of the national domicil of the ward, if such change is possible.

The mere fact that a person is under guardianship in this State cannot prevent him from becoming in fact a citizen and inhabitant of another State, or from exercising any right, or holding any office, limited to citizens and residents of that State; and such domicil will be recognized by the courts of this State, except so far as it contravenes the laws of this State, — that is, so far as it affects the authority of the guardian in this jurisdiction. If the guardian has any authority over the person or property of the ward without the jurisdiction of this State, he certainly has none in regard to the succession to, or the disposition of, the property of the ward after his death. Giving effect to a foreign domicil so far as it affects the succession to property does not contravene any law or rule of policy of this Commonwealth.

The statutes of this Commonwealth recognize the possibility of a change of domicil of one under guardianship here as an insane person from this to another State, though they also recognize the fact that such change will not affect the authority of the guardian in this State. The Pub. Sts. c. 189, § 39, provide that, when a person having a guardian appointed in this Commonwealth removes or resides out of the Commonwealth, the Probate Court may by its decree authorize the guardian to sell the real estate of his ward, and to pay over the proceeds, and the personal estate of the ward or any part thereof, to a guardian appointed in the State or country in which the ward resides. The St. of 1858, c. 117, provided that, "whenever any minor, spendthrift, or insane person shall remove out of this Commonwealth," the guardian appointed in this Commonwealth might, as authorized by the Supreme Judicial Court, pay over estate of his ward to a guardian appointed in the State to which the residence of the ward may have been removed. See also Gen. Sts. c. 109, § 23; St. 1862, c. 139; St. 1866, c. 122. We can have no doubt that the courts of the State to which the residence of a person under guardianship in this State as an insane person had been removed, and in which he resided at the time of his death within the meaning of the statutes, have jurisdiction to prove and allow his will.

When Stone left this State, and went to Iowa to establish his residence there, he had sufficient mental capacity to change his domicil, and he was not under guardianship. The petition for the appointment of a guardian over him was pending, and he had attended a hearing upon it; but there was no adjudication that he was a proper subject for guardianship, and no appointment of a guardian until several weeks after he took up his residence in Iowa. He was under no custody or restraint, and there was no one who had a right to assent or object to his removal. It would seem that his change of domicil was then complete, except that it did not deprive the Probate Court in this State of its jurisdiction over him, or over the petition then pending. If the assent of the guardian after his appointment was necessary, it was given.

If Stone, being of mental capacity to change his domicil, in good faith removed his residence to Iowa while the proceedings for the appointment of a guardian over him were pending, and if his residence in Iowa continued until his death, and was assented to by his guardian after his appointment, we think he was such a resident of Iowa that the courts of that State had jurisdiction of the original probate of his will.

Case to stand for trial.

J. Hopkins, for the appellee.

F. P. Goulding, (*J. E. Beeman* with him,) for the appellant.

WILLIAM W. DALLINGER vs. MARTHA J. DAVIS.

Middlesex. March 6, 1889. — March 30, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Tax — Personal Estate of Deceased Person — Executor — Action by
Collector — Statute of Limitations.*

A tax assessed upon the personalty of a deceased person to his executor is the debt of the latter; and the collector of taxes may, under the Pub. Sts. c. 12, § 21, bring an action against him to recover it more than two years from the time of his giving bond.

W. ALLEN, J. This is an action by the collector of taxes of the city of Cambridge, to recover taxes assessed against the defendant, as executrix, upon personal estate of her testatrix, taxable in Cambridge. The defendant was appointed and gave bond as executrix in January, 1885. The taxes were assessed for the years 1885 and 1886. The action was commenced in May, 1887, more than two years after the giving of notice of her appointment by the defendant. The only defence is under the Pub. Sts. c. 136, § 9, which provide that no executor shall be held to answer to the suit of a creditor of the deceased, unless the suit is commenced within two years from the time of his giving bond as executor. The obvious answer is, that a tax assessed to an executor, upon the personal property of the deceased is the debt of the executor and not of the deceased. The Pub. Sts. in c. 11, § 20, cl. 7, provide that the personal property of the deceased should be assessed to his executor; and in c. 12, § 21, that, when a tax is assessed upon the personal property of a deceased person, the collector may maintain an action of contract therefor in his own name, as for his own debt, against the executor or administrator. *Rich v. Truckerman*, 121 Mass. 222, relied upon by the defendant, was the case of a tax assessed upon the deceased before his death, and has no application to the case at bar. See also St. 1888, c. 390, § 25.*

Exceptions overruled.

H. H. Smith, for the defendant.

C. J. McIntire, for the plaintiff.

* This section is as follows: "When a person assessed for a tax dies or becomes insolvent before the payment thereof, or when a tax is assessed upon the estate of a deceased person, the executor or administrator or assignee shall, if a demand has been made upon him therefor, forthwith, upon his acquiring any moneys applicable to the payment of the tax, pay the same, and in default shall be liable personally therefor, as for a tax assessed upon him."

COMMONWEALTH vs. LEONARD D. DRURY.

Suffolk. April 1, 1889. — April 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Assault with Dangerous Weapon — Evidence.

At the trial of an indictment for an assault with a billy, the defendant, who was permitted to testify that he had carried the billy for twenty years, and that he did not carry it for the purpose of assailing the person assaulted, was asked, "Why did you carry that billy?" *Held*, that the question was rightly excluded.

INDICTMENT for an assault with a "dangerous weapon, to wit, with a certain billy," upon one Harvey.

At the trial in the Superior Court, before *Hammond, J.*, there was evidence on the part of the government tending to show that Drury struck Harvey several blows with a leather-covered metallic instrument known as a "black-jack," injuring him severely. The defendant's counsel then put this question to him: "Why did you carry that billy?" The judge excluded the question, and to this ruling the defendant excepted. The defendant was then asked, "Did you carry that billy for the purpose of assaulting Harvey?" This question was admitted, and the defendant replied in the negative. The defendant was allowed to state that he had carried the billy twenty years.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

P. J. Casey, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

BY THE COURT. The defendant was permitted to testify that he had carried the billy for twenty years, and that he did not carry it for the purpose of assaulting Harvey. The further question, "Why did you carry that billy?" was immaterial. His reason for habitually carrying a billy did not tend to prove that he did not attack Harvey with it.

Exceptions overruled.

COMMONWEALTH vs. HENRY P. LINE.

Suffolk. April 1, 1889. — April 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Common Nuisance — Evidence — Record — Admission.

At the trial of a complaint for keeping and maintaining a common nuisance, to wit, a tenement in B. used for the illegal keeping and sale of intoxicating liquors, after evidence of the record of a plea of guilty by the defendant to a complaint for unlawfully keeping for sale such liquor at B. on a certain day during the time alleged, the government offered evidence tending to prove that the place where he kept liquor for sale on that day was the same tenement as that described in the complaint; and subsequently the defendant testified that he occupied the same tenement on that day, and had it in his mind when he pleaded guilty. *Held*, that the record thus supplemented was sufficient to justify a verdict of guilty.

COMPLAINT for keeping and maintaining a common nuisance, to wit, a tenement in Boston used for the illegal sale and illegal keeping for sale of intoxicating liquors, from June 28, 1888, to December 28, 1888.

At the trial in the Superior Court, before *Hammond, J.*, the government introduced evidence tending to show that the defendant, during the time alleged, lived in a house on Pleasant Street in Boston, being the tenement in question, where he had a victualling saloon; that on several occasions during the same time liquors in small quantities were found in the house by officers; and that a sale of liquor was made in the house by the defendant.

The government then offered in evidence a record of the Superior Court showing that the defendant had, on August 21, 1888, pleaded guilty to a complaint charging him with unlawfully keeping for sale intoxicating liquors on July 20, 1888, at Boston. The defendant objected to the introduction of this record, but the judge admitted so much of it as showed that the defendant appeared in court and pleaded guilty, and the defendant excepted.

There was nothing in the record showing where the liquors, for the illegal keeping of which the defendant pleaded guilty,

were kept, whether in the house on Pleasant Street or elsewhere.

The government then introduced evidence that on July 20, 1888, the defendant carried on business at the house on Pleasant Street, and there was no evidence that he had any business elsewhere. Subsequently, the defendant testified in his own behalf, and it was then admitted that when he pleaded guilty he had this place in Pleasant Street in his mind, and that his business was there on July 20, 1888.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. B. Moran & W. E. Rogers, for the defendant.

A. J. Waterman, Attorney General, *& H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

BY THE COURT. The record of a plea of guilty by the defendant to a complaint charging him with unlawfully keeping for sale intoxicating liquor at Boston on July 20, 1888, was competent as a step in the proof that he kept a tenement used for the illegal sale and keeping of intoxicating liquor, as charged in the complaint before us. Standing by itself, it would not be sufficient proof, because his admission by the plea does not identify the place where the liquors were kept. But the government offered evidence tending to prove that the place where he kept liquor for sale on July 20, 1888, was the same tenement described in this complaint; and, further, the defendant, being a witness in his own behalf, testified that the place described in the complaint was the place occupied by him on July 20, 1888, and which he had in his mind when he pleaded guilty. The record thus supplemented by other proof was competent, and sufficient to justify a verdict of guilty. *Commonwealth v. Austin*, 97 Mass. 595. *Commonwealth v. Hazeltine*, 108 Mass. 479.

Exceptions overruled.

COMMONWEALTH vs. JAMES LOWERY.

Suffolk. April 3, 1889. — April 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Indictment — Breaking and Entering — Larceny — Verdict.

On an indictment charging in the same count a breaking and entering, and a larceny, the jury may return a general verdict, or a verdict of guilty of the larceny only.

INDICTMENT in two counts, charging in the first count a breaking and entering a building, and a larceny, and in the second count a receiving of stolen goods.

In the Superior Court, before the jury was impanelled, the defendant filed a motion to quash the indictment for misjoinder of counts. *Hammond, J.*, overruled the motion.

At the trial, the defendant's counsel asked the judge to rule that he could not be convicted on the indictment for larceny in a building. The judge refused so to rule, and the defendant excepted.

The jury returned a verdict of guilty against the defendant of larceny in a building on the first count, and of not guilty on the second count.

P. J. Casey, for the defendant.

A. J. Waterman, Attorney General, & *H. C. Bliss*, First Assistant Attorney General, for the Commonwealth.

BY THE COURT. It is well settled that, upon an indictment charging in the same count a breaking and entering, and a larceny, the jury may return a general verdict, or a verdict of guilty of the larceny only. *Jennings v. Commonwealth*, 105 Mass. 586. The defendant does not argue his motion to quash the indictment, and we have no doubt that the ruling of the Superior Court thereon was correct.

Exceptions overruled.

COMMONWEALTH vs. PHILIP MARZYNSKI.

Suffolk. April 3, 1889. — May 4, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Lord's Day — Keeping open Shop — Sale of Cigars and Tobacco — "Drugs and Medicines" — Evidence — Res inter Alios — Jury.

A sale of cigars by a tobacconist in his shop in the usual way and for ordinary use on the Lord's Day is not a "sale of drugs and medicines," within the meaning of those words in the St. of 1887, c. 891, § 2, incorporating certain exceptions into the Pub. Sta. c. 98, § 2, which prohibit the keeping open shop on that day for the purpose of doing business.

At the trial of a complaint for keeping open shop on the Lord's day for that purpose, where there was evidence of such a sale of cigars, evidence of an expert and of a medical book as to whether cigars were drugs or medicines, as well as the record of the acquittal of another person for a like sale on that day, were held to be rightly excluded.

Under the Pub. Sta. c. 214, § 17, a jury in a criminal case have no rightful power to determine questions of law involved in the issue against the instructions of the court.

COMPLAINT on the Pub. Sta. c. 98, § 2, alleging that the defendant, at Boston, on July 22, 1888, that day being the Lord's day, "did keep open his shop there situate, and numbered one hundred and four in Eliot Street, for the purpose of doing business therein; the same not being then and there works of necessity or charity."

At the trial in the Superior Court, before *Dewey, J.*, the government called several witnesses, showing that the defendant was a tobacconist; that his shop was at the corner of Eliot Street and Tremont Street, in Boston; and that he kept his shop open, and made a sale of cigars and tobacco, between the hours of eleven o'clock in the forenoon and four o'clock in the afternoon of Sunday, July 22, 1888, that day being the Lord's day. The defendant contended that he had a right to keep his shop open on the Lord's day for the purpose of selling tobacco and cigars, and called Dr. F. A. Harris, and, after qualifying him as an expert, asked him numerous questions as to whether or not tobacco and cigars, or either of them, were drugs or medicines; and as to whether they had any medicinal effect upon the

human system; or whether, if used for pleasurable purposes, that fact deprived them of medicinal effect; or whether the fact that a drug is thus used for a pleasurable purpose makes it less a drug. The judge excluded all of these questions; and the defendant excepted.

The defendant offered in evidence the United States Dispensatory, for the purpose of showing the medicinal effects of tobacco as therein described; but the judge excluded the evidence, and the defendant excepted.

The defendant then called one Benatuille, and, after qualifying him as an expert in the manufacture of cigars, proved by him that a cigar is made of leaf tobacco.

The defendant then offered in evidence the record of the case of *Commonwealth v. Burwell*, tried in the Superior Court in Suffolk County in November, 1887, in which Burwell was charged with the sale of a cigar on Sunday, in October, 1887, and also called him to show that he sold the cigar on that day, and was discharged by reason of the proof that cigars and tobacco were drugs or medicines. The judge excluded the evidence, and the defendant excepted.

No claim was made by the defendant at the trial that he kept or had the right to keep his shop open on the Lord's day for any other purpose than that of selling tobacco and cigars.

The defendant then asked for the following rulings:

"1. If the wording of the statute, under which the defendant is sought to be convicted, is so doubtful that your minds are left in a state of uncertainty whether or not the commission of the acts charged against the defendant is or is not a crime, it will be your duty to acquit.

"2. It is for you to decide both the law and the fact, and if your minds are left in doubt either in regard to the meaning of the statute, or whether or not the matters charged against the defendant have been committed by him or not, it will be your duty to acquit.

"3. It is your duty to decide both the law and the facts, and if the offence with which the defendant is charged is not clearly embraced in the statute under which he is sought to be convicted, it will be your duty to acquit.

"4. In deciding the law as to whether or not this statute

intended to make the sale of tobacco and cigars on Sunday a criminal offence, you have no right to extend the meaning of the statute to a case which is not clearly within the meaning of the statute.

"5. If, from the evidence, you are satisfied that cigars and tobacco are drugs and medicines, it will be your duty to acquit the defendant.

"6. If, from the evidence, your minds are left in reasonable doubt whether or not cigars are drugs or medicines, it will be your duty to acquit.

"7. If the government has not satisfied you beyond a reasonable doubt that cigars and tobacco are not drugs or medicines, it will be your duty to acquit.

"8. The burden of proof is upon the government throughout the trial, and unless the government has satisfied you beyond a reasonable doubt that cigars and tobacco are not drugs or medicines, it will be your duty to acquit."

The judge refused so to rule, and the defendant excepted.

The judge instructed the jury in regard to their duties under the Pub. Sts. c. 214, § 17, and said he would first give them some instruction as to the duties of jurors and of the court without reference to that section; and read to them an extract from the opinion of Mr. Justice Story, in the case of *United States v. Battiste*, 2 Sumner, 240, beginning with the words, (on page 243,) "The learned counsel for the prisoner" contends "that, in criminal cases, and especially in capital cases, the jury are the judges of the law," and ending with the words, (on page 244,) "or choose from wantonness, or ignorance, or accidental mistake to interpret it." The judge also referred to the case of *Commonwealth v. Anthes*, 5 Gray, 185, and told the jury, in substance, that both in that case and in later cases it had been decided in effect that § 17 did not change the law as it had previously existed upon this point; and that the jury had, under that section, or otherwise, no rightful power to determine questions of law involved in the issue, contrary to the instructions of the court.

The judge then instructed the jury, that, if they were satisfied beyond a reasonable doubt that the defendant kept his shop open to sell cigars between the hours of eleven and four on the day named in the complaint, the same being the Lord's

day, it was their duty to find him guilty. To this ruling the defendant objected.

The defendant then asked the judge to give the following ruling: "The Legislature has authorized the jury to try according to established forms and principles of law all criminal cases, and it is for you to decide what the Legislature meant when they authorized you, after you are instructed, in your discretion, to decide both upon the law and the fact in the issue at bar." This the judge declined to do, and the defendant duly excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. B. Goodsell, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

KNOWLTON, J. The defendant was prosecuted for having kept his shop open on the Lord's day for the purpose of doing business therein. The evidence showed that he was a tobacconist, and that he kept his shop open and made a sale of tobacco and cigars on the day named in the complaint. We understand this sale to have included tobacco and cigars in a single transaction. The defendant did not contend, at the trial, that he kept, or had a right to keep, his shop open on the Lord's day for any other purpose than that of selling tobacco and cigars. The jury were instructed, in substance, that keeping one's shop open to sell cigars on the Lord's day would subject him to conviction of the offence named in this complaint; and the principal question in the case is whether that instruction was correct. Under the instruction, the jury must have found that the defendant's purpose was to sell cigars, and in this aspect of the case the evidence offered in regard to tobacco was immaterial.

The act complained of was keeping open the shop, not making the sale, and the question arises under the St. of 1887, c. 391, § 2, which amends the Pub. Sts. c. 98, § 2, by adding a provision that nothing in this last section shall be held to prohibit certain named acts and kinds of business, among which is "the retail sale of drugs and medicines." If, upon the facts of this case, keeping the defendant's shop open to sell cigars was merely keeping it open to sell drugs and medicines, the instruction was erroneous; but if, as matter of law, it was keeping it open for a

purpose other than that of selling drugs and medicines, the instruction was correct.

Ordinarily, whether a substance or article comes within a given description, is a question of fact; but some facts are so obvious and familiar that the law takes notice of them and receives them into its own domain. If the proof had been that the shop was kept open for the purpose of selling guns or pistols, it would hardly be contended that the judge might not properly have ruled that the sale of these articles was not a sale of drugs or medicines. The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinions of witnesses who offer to testify that they are. *Commonwealth v. Peckham*, 2 Gray, 514. *Commonwealth v. Crowley*, 145 Mass. 430.

Cigars are manufactured articles familiar to everybody. The materials of which they are composed are carefully prepared and put into form, until they lose their original character as mere materials, and become articles of commerce, known by a new name and adapted to a particular use. We are of opinion that cigars sold by a tobacconist in the ordinary way are not drugs or medicines within the meaning of those words as used in the statute.

Many things which are not in themselves medicines may be put to a medicinal use, and when so used, they may become medicines. But there was no evidence in the present case that the cigars which the defendant sold were used, or were intended to be used, as a medicine, or that the defendant kept his shop open for the purpose of furnishing cigars to be used medicinally. The instruction must therefore be construed in its application to evidence of an ordinary sale of cigars, and, so applied, we are of opinion that it was correct.

In their application to the evidence of such a sale all the questions to the witness Harris were immaterial and incompetent.

The record in the case of *Commonwealth v. Burwell* was not between the parties now contending, and was rightly excluded.

The court rightly ruled that the United States Dispensatory could not be put in evidence. *Commonwealth v. Brown*, 121 Mass. 69.

The instructions to the jury, in regard to their duty to follow the charge of the judge in matters of law, were in accordance with the rule laid down in *Commonwealth v. Anthes*, 5 Gray, 185, which has ever since been the settled law of this Commonwealth.

We find no error in any other of the rulings or refusals to rule set out in the bill of exceptions.

Exceptions overruled.

PETER W. FRENCH *vs.* JAMES W. BATES.

SAME *vs.* ALBERT D. CROMBIE.

SAME *vs.* SILAS M. SPENCER.

DANIEL W. KING *vs.* JAMES W. BATES.

SAME *vs.* ALBERT D. CROMBIE.

SAME *vs.* SILAS M. SPENCER.

Suffolk. November 16, 19, 1888.— May 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.

Promissory Note — Guaranty of Interest — Discharge — Subrogation.

A religious society, to secure a first and a second mortgage upon its land, both given for money lent, made two promissory notes, each containing a promise to pay the principal sum in five years from date, "with interest semiannually, at the rate of eight per centum per annum, payable on the first days of January and July of each year during said term, and for such further time as said principal sum, or any part thereof, shall remain unpaid." A guaranty on each note, of even date therewith, signed by several persons, recited that the loans were made at their request, in consideration of which "we, the undersigned, hereby severally, and not jointly, (one sixth part each,) guarantee . . . the punctual payment of the interest on the above note, and in default of such payment by the promisor, we hereby promise to pay the same on demand." Held, that the payees could maintain separate actions against the guarantors to recover interest accruing after the maturity of the notes, and so long as the principal sums remained unpaid.

After the maturity of the notes and a breach of condition of the first mortgage, the first mortgagee covenanted with the second mortgagee, in consideration of a cash payment by him and of a guaranty for the payment of certain interest upon the first mortgage note until a certain date, not to foreclose the first mort-

gage before that date without the latter's written consent; not to indorse any payment so made upon that note so as to operate as a payment of principal or interest thereon; to permit him, at his sole expense, but in the name and for the benefit of the first mortgagee to collect that note; and to sell the first mortgage and note to him upon certain terms, with a proviso that, if such note was not paid or bought by the second mortgagee by that date, the latter was to forfeit all sums already paid by him to the first mortgagee, who upon receiving from any source more than a certain sum was to pay over the excess to such second mortgagee. *Held*, that there was no discharge of the guarantors.

SIX ACTIONS OF CONTRACT, by Peter W. French and by Daniel W. King, trustee of the estate of Sarah P. King, against the defendants as guarantors, to recover interest on certain promissory notes. Writs dated October 28 and 29, 1884. The cases were submitted to the Superior Court, and, after judgment for the defendant in each case, to this court, on appeal, on agreed statements of facts, in substance as follows.

On July 12, 1877, the plaintiff King, as such trustee, lent to the First Congregational Society of Maplewood the sum of \$5,000, and the plaintiff French also lent to it a further sum of \$2,500, in consideration of which that society duly executed and gave to each a promissory note for a corresponding amount, in which "The First Congregational Society of Maplewood, Mass., promises to pay" in one to French and in the other to King as trustee, "or order," the sums lent by them respectively, "in five years from this date, with interest semiannually, at the rate of eight per centum" per annum, "payable on the first days of January and July of each year during said term, and for such further time as said principal sum, or any part thereof, shall remain unpaid, reserving the right to pay five hundred dollars of the principal on the first day of July of each year."

On the same day the defendants and others signed agreements, written upon the same paper with and below each note, each of which recited that, "For value received, and in consideration of the loan for which the above note is given, which loan is this day made at our request, we, the undersigned, hereby severally, and not jointly," the defendants Bates and Crombie for "one sixth part each," and the defendant Spencer for one twelfth, "guarantee" to King and French respectively, "his executors, administrators and assigns, the punctual payment of the interest on the above note, and in default of such payment by the

promisor, 'we hereby promise to pay the same on demand, waiving demand on the promisor, and notice.'

The society also on the same day duly executed and gave to King, as trustee, a first mortgage upon real estate owned by it in Malden, containing the usual power of sale to be exercised upon any breach of condition, to secure the payment of the note given to him, and of the instalments of interest thereon as they became due; and at the same time gave a second mortgage to French thereon to secure the note given to him and the interest thereon, which contained a like power of sale and was expressed to be subject to the mortgage to King. The society duly paid the interest on each note to King and French until July 1, 1882, but not afterwards, and subsequently to that date the defendants respectively paid certain sums only on account of the several proportions of interest claimed to be due from them as such guarantors.

On September 5, 1882, King and French entered into the following agreement, under seal, the recital of facts in which was agreed to be true:

"Whereas, Daniel W. King, as he is trustee of the estate of Sarah P. King, is the holder of a certain mortgage given to him as trustee as aforesaid by the First Congregational Society of Maplewood, Mass., dated July 12, 1877, and recorded with Middlesex South District Deeds, lib. 1443, folio 261, said mortgage being the first mortgage upon the premises therein described; and whereas there has been and is a breach of the conditions of said mortgage, and said trustee has published notice that the premises conveyed by said mortgage will be sold on the sixth day of September current, under the power of sale contained in said mortgage; and whereas Peter W. French is the holder of the second mortgage upon said premises given to him by the said society, and wishes that the premises may not now be sold according to the published notice; now, therefore,

"This agreement, made by and between said King, as trustee as aforesaid, and said French, witnesseth, that the said French, in consideration of the promises and agreements hereinafter made by said King as trustee as aforesaid, hereby promises and agrees:

"First. That he, the said French, will, on or before the fifth day of October, A. D. 1882, pay to the said King the sum of

one thousand dollars in cash, and also the actual cash expense already incurred by said King, trustee, in advertising and preparing to sell under said first mortgage.

"Second. That he, said French, does hereby guarantee to said King, trustee, the prompt semiannual payment of interest on said first mortgage note accruing from this date to October 1, 1885, to the extent of seven per centum per annum on five thousand dollars till payment of said sum of one thousand dollars, and on four thousand dollars thereafter to said first day of October, 1885, and promises and agrees that he will pay any deficit of interest guaranteed by him within thirty days after such interest becomes due by the terms of the note secured by such first mortgage; also, that on or before December 1, 1882, he will pay all or any part of the interest accrued to this date at eight per centum, and then remaining unpaid.

"And in consideration of the foregoing, the said King, trustee, promises and agrees:

"1st. That the said first mortgage shall not be foreclosed, and that the premises conveyed thereby shall not be sold thereunder before the first day of October, 1885, without the consent in writing of said French or his legal representative; but this promise is upon the express condition that the said French shall faithfully perform the promises and agreements hereinbefore made by him.

"2d. That no payment made or to be made by said French, as above provided, shall be indorsed on the note secured by said first mortgage, or shall operate as payment of any part of the principal or interest of said first mortgage; so that the claims of the present or future holder of said first mortgage and note against the maker thereof, and against any guarantors other than said French, shall not be affected by any payments made or to be made by said French.

"3d. That the said French may, in said trustee's name, and for said trustee's benefit, but at his (said French's) sole charge and expense, take such steps as seem best to him to collect the said first mortgage note and interest, whether from the makers or guarantors thereof.

"4th. That the said trustee will, at any time before said mortgage note shall have been paid, sell, transfer, and assign to

the said French said first mortgage and note, together with all claims against any guarantors other than said French, upon the payment by said French to said trustee of the sum of five thousand dollars principal (i. e. four thousand dollars in addition to the one thousand dollars to be paid on or before October 5th, 1882), and the interest already accrued at eight per centum and then remaining unpaid, together with the interest accruing hereafter at seven per centum, as provided by the guaranty hereinbefore made by said French.

"5th. In case said first mortgage note is not paid by any party, and is not purchased by said French, on or before said first day of October, 1885, then the sums paid by said French shall be forfeited to the use of said trustee, who may proceed to sell under said first mortgage. But if said French, or his legal representatives and assigns, shall become the purchaser at such sale, then the said one thousand dollars shall be treated as part payment of the sum bid by said French, or his legal representatives and assigns, provided that the sum so bid shall be equal to the amount due on the mortgage note at seven per centum.

"6th. That in case the payments made by said French, added to any payments which may be made at any time hereafter, or realized from a sale of the mortgaged property, on said first mortgage note by any other party or parties, shall together make a sum greater than the sum for which said trustee has above agreed to sell said first mortgage and note, the excess above said last mentioned sum shall be forthwith returned to said French. And this sixth promise and agreement said King makes not only as trustee, but also individually."

In pursuance of the terms of the above agreement, French paid to King the sums which he therein promised to pay to him, and at or about the times when he agreed to pay them, and such payments were not indorsed on the first mortgage note, but a separate account thereof was kept by King. Before November 20, 1882, a breach of the condition of the second mortgage was committed, and on that day French duly executed the power of sale contained in that mortgage, and sold the premises covered thereby to himself for the sum of one hundred dollars, and duly conveyed them to himself, by deed dated November 23, 1882. The expenses duly incurred by French by reason of the breach

of condition amounted to fifty dollars, and immediately after the execution of the power he indorsed on the note a payment of fifty dollars on account of the principal thereof, under date of November 20, 1882. No payments of interest or principal upon either note have been made to the plaintiffs except as above stated, and the first mortgage has not been foreclosed. The last three cases were brought by King at the expense of French.

If upon the above facts the plaintiffs were entitled to recover, judgment was to be entered for them for certain sums agreed upon; otherwise, judgment was to be entered for the defendants.

The cases were argued at the bar in November, 1888, and afterwards were submitted on the briefs to all the judges.

L. L. Scaife, for the plaintiffs.

W. C. Cogswell, (*O. T. Gray* with him,) for the defendants.

FIELD, J. The First Congregational Society of Maplewood, on July 12, 1877, gave two promissory notes, one to King, as trustee, for the sum of five thousand dollars, and one to French for the sum of twenty-five hundred dollars. Each note contained a promise to pay the principal sum in five years from date, "with interest semiannually, at the rate of eight per centum" per annum, "payable on the first days of January and July of each year during said term, and for such further time as said principal sum, or any part thereof, shall remain unpaid, reserving the right to pay five hundred dollars of the principal on the first day of July of each year." The note to King was secured by a first mortgage, and that to French by a second mortgage, upon the real property of the society. On the same day the defendants in these cases, with other persons, signed on each note a guaranty to the payee as follows: "For value received, and in consideration of the loan for which the above note is given, which loan is this day made at our request, we, the undersigned, hereby severally, and not jointly (one sixth part each), guarantee . . . the punctual payment of the interest on the above note, and in default of such payment by the promisor, we hereby promise to pay the same on demand, waiving demand on the promisor, and notice."

These suits are brought by French and King respectively against three of the guarantors severally to recover interest accruing after the maturity of the notes.

The first question is, whether, by the terms of the guaranties, the guarantors are liable for the interest accruing after the maturity of the notes. The contention is, that, construing all the papers together, it appears that it was the intention of the parties that the guarantors should only be liable for the payment of interest until the principal debt became payable; that the payees relied wholly upon the society for the payment of the principal debt, and that it could not have been the intention that the guarantors should be liable for the payment of interest indefinitely, or be compelled to pay both principal and interest in order to relieve themselves from the liability to pay interest, if the payees did not choose to collect at maturity, by foreclosure of the mortgage or otherwise, debts drawing interest at the rate of eight per centum annually.

Whatever may have been the expectation of the parties, the contracts they actually made must be found in the written papers. Interest is payable on the principal sum of these notes after maturity at the rate of eight per centum per annum, by virtue of the contract, and it is payable as interest, and not as damages for breach of the contract to pay the principal sum. This, we think, would be held even by those courts which allow the statutory and not the stipulated rate of interest after maturity, when the provision is not express that the stipulated rate shall continue after maturity. See *Union Institution for Savings v. Boston*, 129 Mass. 82.

It has been suggested, that after the maturity of the notes separate actions could not be maintained by the payees to recover the interest and the principal, and that it is unreasonable to construe the guaranties as covering an incident of the debt when they do not cover the debt itself. Whether in an action to recover the principal the interest then due must be included as an incident, and if not included, whether, after judgment recovered for the principal debt, an action for interest could be maintained, need not be decided. See *King v. Phillips*, 95 N. C. 245; *Fake v. Eddy*, 15 Wend. 76. The promises to pay interest and to pay the principal are severable, and we see no objection to the maintenance of an action after the maturity of the notes upon an express promise to pay interest without including it in the principal debt. *Sparhawk v. Wills*, 6 Gray,

163. *Andover Savings Bank v. Adams*, 1 Allen, 28. We have no doubt that the payment of the principal sum at maturity, and the payment of interest either before or after maturity, or both, may be separately made the subject of a guaranty.

The guaranties promise the punctual payment of the interest; but from this we cannot infer that the guaranties were intended to be confined to the payment of interest accruing before the maturity of the notes, because, by the terms of the notes, interest accruing after maturity was made payable on the first days of January and July of each year, in the same manner and at the same rate as before, so long as the principal sum remained unpaid. If any inference could be drawn in construing guaranties of commercial paper from the usage of banks and business men to collect notes when they become due, there is not the same reason to draw the same inference when the notes have a long time to run, and are secured by mortgages on real property. It is notorious that such notes are often permitted to remain unpaid for a long time after maturity if the security is satisfactory. The notes themselves contemplate the possibility that the principal sums may not be paid at maturity, for they make provision for the payment of interest after maturity as well as before. In these respects these cases differ from *Hamilton v. Van Rensselaer*, 43 N. Y. 244, and *Melick v. Knox*, 44 N. Y. 676.

It is argued that the manifest object of the guarantors was to prevent a foreclosure of each mortgage for non-payment of interest before the maturity of the notes. There is nothing in the agreed statement of facts that indicates this except that the guarantors promise to pay the interest only. The guaranties recite that the loans were made at the request of the guarantors. We do not know whether the guaranties were furnished because the lenders of the money wanted better security, or because the borrower wanted to be sure that there would be no foreclosure for breach of condition before the notes matured; but if the latter was the intention, it was not carried into effect, for it was not agreed that, if the promisor did not pay the interest as it became due, the mortgagees should, until the maturity of the notes, collect it of the guarantors, and not proceed to foreclose the mortgages. As there is no limitation in the guaranties,

and as the notes provide for the payment of interest after as well as before maturity, we cannot construe the papers as limiting the obligation of the defendants to the payment of interest accruing before the maturity of the notes. There is no further contention by the defendants in regard to the suits brought by French.

In the suits brought by King as trustee, the effect of the agreement entered into by King and French, and of the payments of money by French under this agreement, must be considered. French was second mortgagee, and as such had the right to redeem the land from the first mortgage; but he was under no obligation to pay the note secured by the first mortgage. If he paid it and took an assignment of the first mortgage, it must be considered, in the absence of any agreement or declaration of his to the contrary, that he paid it for the protection of himself as second mortgagee. As French in making the agreement with King did not act, or assume to act, in behalf of the maker of the note, or of the guarantors, they cannot avail themselves of the stipulations contained in the agreement. They are neither bound by those entered into by French, nor can they enforce those entered into by King. They are strangers to the agreement, and the agreement has no effect upon their rights and obligations under the guaranty. The neglect of the first mortgagee to foreclose the mortgage does not discharge the guarantors; they can pay the debt after its maturity whenever they choose, and compel the holder of the mortgage to discharge it or to assign it to them, but until they pay the debt, they cannot complain that the holder does not foreclose the mortgage. *Wilcox v. Fairhaven Bank*, 7 Allen, 270. *Allen v. Brown*, 124 Mass. 77. *Watertown Ins. Co. v. Simmons*, 131 Mass. 85.

The covenant not to foreclose the mortgage before October 1, 1885, is not an agreement giving time to the principal debtor, and does not discharge the guarantors, because, as has been said, the principal debtor is not a party to the agreement containing this covenant, and neither the principal debtor nor the guarantors could require the performance by King of any of his covenants contained in this agreement. *Frazer v. Jordan*, 8 El. & Bl. 303, 312. *Greely v. Dow*, 2 Met. 176.

The payments made by French under the agreement do not purport to have been made in behalf of the principal debtor, or of the guarantors; but it is expressly provided that they should not "operate as payment of any part of the principal or interest of said first mortgage"; and as French was under no obligation to make any payments on account of the debt secured by this mortgage, he could agree with King that any money he paid should be applied toward a purchase of the mortgage and of the debt secured by it, rather than toward a payment of this debt and a discharge of the mortgage. The security given to King has not been impaired by the acts of anybody, and can be transferred to the guarantors undiminished if they pay the debt.

For these reasons a majority of the court are of opinion that the guarantors are liable to pay interest on the notes so long as the principal sum remains unpaid, and that in the suits brought by King as trustee the facts do not show that they have been discharged. The judgment for the defendants must be reversed, and there must be judgment for the plaintiffs in the suits for the amounts respectively agreed upon in the agreed statements of facts.

So ordered.



WILLIAM M. OGDEN *vs.* WILLIAM G. A. PATTEE & another.

Suffolk. January 8, 1880. — May 6, 1880.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.

Legacy — Coupon Bond — Interest.

A specific legacy of a coupon bond carries with it an overdue negotiable coupon attached to it at the testator's death.

Interest on a pecuniary legacy is to be allowed after one year from the testator's death as incident to the legacy.

CONTRACT. The first count of the declaration was as follows:
"And the plaintiff says that Eliza Appleton, late of Boston, deceased, testate, on the 10th day of August, 1885; that her will

was admitted to probate in the Probate Court for said county of Suffolk, January 21, 1887, and letters of administration with the will annexed were granted to the defendants, February 21, 1887, who accepted the trust; that by her said will said Eliza Appleton bequeathed to the plaintiff one seven per cent bond of the Boston and Albany Railroad Company, being bond No. 194; that said bond was a coupon bond, each coupon being for the payment of six months' interest on said bond; that said bond with the coupons came into the possession of the defendants, who collected the interest thereon falling due August 1, 1885, and February 1 and August 1, 1886, and February 1, 1887; that they have delivered to the said plaintiff said bond, and paid him the interest collected thereon, February 1 and August 1, 1886, and February 1, 1887, but have neglected and refused to pay him the interest due on said bond, August 1, 1885, though oft requested so to do. And the plaintiff says the defendants owe him thirty-five dollars for money had and received by them to the plaintiff's use as aforesaid, being the amount received by them as the interest on said bond falling due August 1, 1885. And the plaintiff says that on or about August 1, 1886, and at sundry times afterward, he demanded of the defendants payment of said interest, and also said coupon, which interest the defendants refused to pay, and which coupon they refused to deliver, and the defendants owe him interest thereon from the 10th day of August, 1886."

The second count of the declaration was as follows: "And the plaintiff further says, that by her said will, admitted to probate in Suffolk County, January 21, 1887, said Eliza Appleton bequeathed to him ten thousand (10,000) dollars; that the defendants were appointed administrators with the will annexed, and accepted the trust, February 21, 1887; that they received and took possession of a large amount of personal property, to wit, sixty thousand dollars in cash and valuable securities bearing interest and belonging to her estate; that, May 25, 1887, the defendants paid to the plaintiff ten thousand dollars, but have neglected and refused to pay him the interest that had accrued on said legacy, though oft requested so to do; and the plaintiff says the defendants, as administrators aforesaid, owe him the interest on said ten thousand dollars from the expiration of one

year from the date of the death of said Eliza Appleton, to wit, from August 10, 1886 ; and the plaintiff says he demanded the interest of the defendants, May 21, 1887, and also on March 8, 1888, which the defendants refused to pay."

Writ dated March 17, 1888.

The defendants demurred to the declaration, on the ground that it did not set forth a legal cause of action. The Superior Court overruled the demurrer, and ordered judgment for the plaintiff for \$541.96 ; and the defendants appealed to this court. The case was submitted on briefs to all the judges.

D. C. Linscott, for the plaintiff.

A. Russ, for the defendants.

HOLMES, J. 1. The court is of the opinion that the specific legacy of the bond carried the bond in such form as the testator left it, and therefore, that if, as seems to be conceded, the overdue negotiable coupon was physically attached to it at the testator's death, the coupon passed with the bond.

2. The second count is for interest on a pecuniary legacy between August 10, 1886, one year from the testatrix's death, and May 25, 1887, the date when the legacy was paid. The defendants rely upon the fact disclosed by the count, that the will was not proved until January 21, 1887. But interest "does not depend upon demand or default." It "follows as an accretion to the principal legacy." *Kent v. Dunham*, 106 Mass. 586, 591. The administrators will not be charged personally, and it may be presumed that the estate was receiving interest on the fund, although not in the administrators' hands. See *Wood v. Penoyre*, 13 Ves. 326 ; *Sitwell v. Bernard*, 6 Ves. 520, 539.

Judgment for the plaintiff.

GEORGE A. CHASE vs. CITY OF LOWELL.

Middlesex. January 22, 1889. — May 6, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Personal Injuries — Defective Shade Tree in Way — Removal by
Highway Surveyor.*

A highway surveyor has no power summarily to cut down and remove a shade tree standing in the highway, upon being notified that it is unsound and dangerous to travellers; but, under the Pub. Sts. c. 52, § 10, as amended by the St. of 1885, c. 123, § 2, must proceed to obtain authority to do so upon due proceedings had from the proper municipal authorities, meanwhile taking due precaution against the danger.

TORT for personal injuries occasioned to the plaintiff by the fall of a tree standing in Worthen Street in Lowell. At the trial in the Superior Court, before *Sherman, J.*, the plaintiff introduced evidence tending to prove the following facts.

The tree in question stood in an opening in the pavement of the carriageway of Worthen Street, next the curbstone of the sidewalk, and in front of the premises of Dr. F. C. Plunkett. On September 23, 1885, about one o'clock, P. M., while the plaintiff, in the exercise of due care, was walking along on the other sidewalk of the street and had reached a point nearly opposite where this tree stood, it was blown over by a strong wind, across the street, striking the plaintiff in its fall, and prostrating him senseless to the sidewalk. The tree was in a decayed condition, and where it broke off was rotten, except a live rim on the outside about one fourth of an inch in thickness, and extending about one quarter around the tree. One Woodward was superintendent of the streets of the city for that year, and under the ordinances of the city had the charge and supervision of all the streets in the city, and the duty of repairing and caring for the same, the work of paving Worthen Street being done under his direction. The defendant city had no forester. While the work of paving the street was going on, the roots of this tree were uncovered and remained exposed to view a day or so, and at that time were more or less decayed. When the paving was being done, one Hale employed by the defendant

under Woodward to do it cut off portions of the roots of this tree. Woodward passed through the street where this work was being done several times a day, while the same was going on, for the purpose of looking after and supervising it.

One Aldrich, called by the plaintiff, testified that he was employed by the defendant in the street department, and was detailed by Woodward to trim and take charge of the shade trees in the city, and to cut down and remove such trees as were so ordered by the superintendent; that after pruning this tree he said to Woodward that it ought to come down; that Woodward asked him, "What does Doctor Plunkett say about it?" to which he replied, "He says he has had one cut down, and don't want another"; and Woodward said, "Then let it stand."

There was no evidence of any formal complaint in reference to the tree to the mayor and aldermen, or any adjudication by the board as to cutting down or removing the same.

The defendant requested the judge to instruct the jury as follows:

"1. The defendant is not liable in this action upon the evidence presented by the plaintiff.

"2. The defendant had no power or right to remove or cut down the tree causing the injury to the plaintiff, without such complaint to and adjudication by the proper authorities as to the removal or destruction of the same as are provided by law. . . .

"4. No notice of the alleged defect was given to the proper authorities, viz. the mayor and aldermen.

"6. If the jury find that the only practical method of preventing injury to the plaintiff was to remove the tree, and the city had no right or power to remove said tree without being authorized according to law, and it was not so authorized, then the defendant is not liable in this action."

The judge refused to give these rulings, but gave other instructions to which no exception was taken, and among them were these:

"To entitle the plaintiff to recover he must prove . . . that the tree was in such a condition when it fell upon the plaintiff as to make the street defective and dangerous to travellers; that

he received the injury complained of through a defect in this street; that the tree was blown down by such winds as ordinarily occur at that season, in this climate; that the city had reasonable notice of the defect, or might by the exercise of proper care and diligence on its part have had notice of it in season to have prevented the injury complained of; that it is a question of fact for the jury to determine from the evidence whether this tree was in such a condition as constituted a defect in the street at the time of the accident or not. . . . If you find that the tree was a defect in the street, . . . then you will proceed and determine whether the city had reasonable notice of the defect, or by the exercise of proper care and diligence on its part might have had notice, in season to have prevented the injury. Notice to the city must be notice to some officer who has charge of the streets, who has authority to act in relation thereto. Notice to Aldrich, or Hale, or the pavers, would not be notice to the city. The superintendent of streets is an officer competent to receive notice. It is claimed by the plaintiff that the superintendent of streets had direct notice of the defect. . . . Actual reasonable notice to the city of the defect, if any, must be in such language as to call the attention of some person authorized to receive notice to the fact that the tree was dangerous in its then condition. If you find there was not actual notice, then you will next determine from the evidence whether the city might have had reasonable notice thereof by the exercise of proper care and diligence on its part in season to have prevented the injury complained of. . . .

“In determining this, you may consider all the evidence introduced as to its condition . . . as bearing upon the question whether the city might have had reasonable notice by the exercise of due care and diligence on its part. . . . If it exhibited such a state by its appearance, either at its roots or at the top, anywhere, that the city was put upon notice and ought to have made further search because of that fact, and did not, then that bears upon the question whether the city, by the exercise of that care and diligence which it ought to have exercised, might have had notice.”

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. T. Greenhalge, for the defendant.

J. N. Marshall, (*M. L. Hamblet* with him,) for the plaintiff.

W. ALLEN, J. The plaintiff was injured while travelling in a public street in Lowell, by the falling upon him of a shade tree growing in the street. There was evidence that the tree was defective and dangerous from its liability to be blown down by ordinary high winds. The court refused to give the instruction asked by the defendant, that "the defendant had no power or right to remove or cut down the tree causing the injury to the plaintiff, without such complaint to and adjudication by the proper authorities as to the removal or destruction of the same as are provided by law"; and the instructions to the jury as to the liability of the defendant in consequence of reasonable notice of the defect, and for the want of reasonable care and diligence which might have prevented the injury, were on the assumption that the highway surveyor had authority to cut down or remove the tree. Whether the defendant had reasonable notice of the defect, and used reasonable care and diligence to remedy it, may have depended upon whether the highway surveyor could cut down the tree immediately upon notice that it constituted a defect in the way.

Section 10 of the Pub. Sts. c. 52, is amended by the St. of 1885, c. 123, § 2, so as to read, "The officer appointed to have the care of the trees belonging to a city or town, and his assistants, but no other person, except as is provided in the following section, and in section ten of chapter fifty-four, may, and when required by the surveyors of highways or road commissioners, shall trim or lop off trees and bushes standing in highways, town ways, streets, or lanes, and when ordered by a vote of the mayor and aldermen, selectmen, or road commissioners, passed after public notice and hearing, shall cut down and remove such trees; and the surveyors of highways and road commissioners shall forthwith cause to be dug up and removed whatever obstructs such ways, or endangers, hinders, or incommodes persons travelling thereon; and shall forthwith cause snow to be removed from such ways, or to be so trodden down as to make the ways reasonably safe and convenient."

It is argued that this statute will not be construed to include shade trees that endanger travellers upon the highway, but that,

under the general provisions of the statutes requiring towns and cities to keep the highways safe and convenient for travel, and under the duty imposed upon highway surveyors to remove whatever incommodes or endangers travellers, they have a right to cut down a shade tree which has become dangerous to travellers. We think that the statute limits the duty of the surveyor of highways in such a case to procuring an adjudication that the tree is dangerous and shall be removed, and, until it shall be so removed, to taking due precautions against the danger. The history as well as the language of the statute shows that this is its meaning.

Sections 1, 2, and 3 of the Rev. Sts. c. 25, are taken from the St. of 1786, c. 81, § 1, which prescribed the duties of towns and of highway surveyors in respect to the repair of highways. Section 3 of the Rev. Sts. c. 25, contains the part of the St. of 1786 which defines the general powers and duties of highway surveyors in reference to highways, and provides that "every surveyor of highways shall have full power (except as provided in the following section) to cut down or lop off all trees and bushes, and to dig up and remove all stones, stumps, fences, gates, bars, enclosures, or other things that shall in any manner obstruct or incumber any highway or town way, or hinder, incommode or endanger persons travelling thereon; and when any such way is incumbered with snow, he shall forthwith cause the same to be removed or so trodden down as to make the way safe and convenient." The next section referred to gates, etc., put up to prevent the spread of contagious diseases.

The St. of 1856, c. 256, first authorized the planting of shade trees in highways, and provided that trees planted under such license should be the private property of the person planting them, and should not be deemed a nuisance, but might be removed by the mayor and aldermen, selectmen, or road commissioners, on complaint to them. The provision was re-enacted and extended to all shade trees in the Gen. Sts. c. 46, § 6, which was re-enacted in the Pub. Sts. c. 54, § 6. It was decided in *White v. Godfrey*, 97 Mass. 472, that this statute limited the authority of highway surveyors. See also *Bliss v. Ball*, 99 Mass. 597; *McCarthy v. Boston*, 135 Mass. 197; and *Gaylord v. King*, 142 Mass. 496. Section 3 of the Rev. Sts. c. 25, was

re-enacted in the Gen. Sts. c. 44, § 8, the first part of the section being changed so as to read, "Surveyors of highways, except as is provided in the following section, and in sections six and nine of chapter forty-six, may cut down or lop off trees and bushes, and dig up and remove whatever obstructs or incumbers a highway or town way," and concluding with the provision in regard to snow, as in the Revised Statutes. In re-enacting this statute, as amended by the St. of 1880, c. 62, in the Pub. Sts. c. 52, § 10, the words "except such as are needed for shade trees" were added to the exception, so that it read, "except as is provided in the following section and in sections six and nine of chapter fifty-four, may cut down or lop off trees and bushes, except such as are needed for shade trees." The Pub. Sts. c. 54, § 10, forbid any person from cutting down a shade or ornamental tree standing in a public way in a town or city, unless authorized by the municipal authorities. Section 12 of that chapter provides that § 10 should take effect only in cities and towns which had accepted it.

There was, then, before the enactment of the St. of 1885, c. 123, a statute providing that shade trees in streets should be private property, and should not be deemed a nuisance, but might be removed on complaint, and an adjudication that public necessity required their removal; there was a statute in force only when adopted by a town or city, forbidding the owner or any other person to cut down a shade tree standing in the highway without notice to the authorities, and authorizing them to prevent it from being cut down; and a statute authorizing highway surveyors to cut down and lop off trees in the highway, except as provided in these statutes, and except such as were needed for shade trees. The St. of 1885, c. 123, in § 3, expressly repealed the Pub. Sts. c. 54, § 12, which required § 10 to be adopted by towns and cities to have effect, (thus making it penal for any person, without the permission of the authorities, to cut down a shade tree standing in a public way,) and in § 2 amended the statute giving authority to highway surveyors by providing that no person except an officer appointed to have the care of trees, and except on an adjudication under the Pub. Sts. c. 54, § 10, should trim or lop off trees and bushes in the highway; and that such officer should trim or lop off such trees and bushes when

required by the highway surveyor, and should cut down and remove trees in the highway when ordered to do so by an order of the mayor and aldermen, selectmen, or road commissioners, passed after notice and a hearing.

The subject matter of the statute is the same as that of the Rev. Sts. c. 25, § 3, and the St. of 1786, c. 81, § 1. In the Revised Statutes the right to lop off and cut down trees was specified as one of several particulars in a section defining the powers and duties of surveyors of highways. The rest of the section remains unchanged in the statute of 1885, except that superfluous words were omitted when the General Statutes were enacted. The simple provision that highway surveyors might lop off and cut down trees has been gradually changed to conform to other statutes relating to the culture and preservation of shade trees, until, as amended by the St. of 1885, c. 123, § 2, it becomes an enactment that only the officer appointed to have the care of trees in a town or city shall trim, lop off, or cut down a tree standing in a public way, and that he shall not cut down such a tree without an adjudication of the mayor and aldermen, selectmen, or road commissioners. The whole section, like § 3 of the Rev. Sts. c. 25, defines the powers and duties of highway surveyors in removing obstructions from public ways, and it is the same in substance as the section of the earlier statute of 1786, except as regards trees standing in the way, and in regard to them it gives or leaves to the highway surveyors power to require the proper officer to trim them or lop them off, and power to apply to the proper tribunal for an adjudication that they shall be removed. The fact that in the latest amendment the provision was extended so as to include in the prohibition others than surveyors of highways does not show the intention to exclude them. The statute does not distinguish between a tree which endangers and one which incommodes travellers, and it intends that the questions whether a tree standing in the highway is a shade tree, and whether it incommodes or endangers travellers and should be removed, shall be determined, not by the summary discretion of a highway surveyor, but by the adjudication of a tribunal designated by the statute.

Exceptions sustained.

F. GORDON DEXTER & others vs. CHARLES U. COTTING.

Suffolk. January 30, 1889. — May 6, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Trustee — Appointment — Exemption from giving Sureties — Notice —
“Interested” Persons.*

The Pub. Sta. c. 141, providing in § 16 that a trustee of an estate may be exempted from giving sureties on his bond at the request of “all the persons beneficially interested” therein, and in § 5, that a new trustee may be appointed to fill a vacancy “after notice to all persons interested,” unless they assent thereto or waive notice under the Pub. Sta. c. 156, § 87, refer to such interested persons only as are in being and have a present vested interest in the estate, and not to such as are not in being nor to such as may become interested in the future.

BILL IN EQUITY, filed November 7, 1888, by F. Gordon Dexter, William Appleton, and J. Morris Meredith, trustees under the will of William Appleton, and by Emily W. Appleton, his widow, for the specific performance by the defendant of an agreement to purchase real and personal estate.

The bill alleged the following facts. William Appleton, who died on February 10, 1877, leaving a widow, and a son and a married daughter, both of full age, owned the property in question at the time of his death. His will, which was duly admitted to probate on March 5, 1877, after giving a life estate to his wife in such property, and providing that the residue of his estate should be held by John A. Burnham, F. Gordon Dexter, and the testator's son, in trust, to pay over a portion of the net income up to a certain sum to his wife, during her life or until her remarriage, and any excess of income above that sum to his son and daughter, if the trustees and widow should deem best, concluded as follows :

“At the death or marriage of my wife, Emily, I desire the income that she would have received if living be given to my children ; one half of the income each yearly in quarterly payments if my children and the trustees think best. I desire always to have two trustees besides my son, William Appleton, Jr. ; but if he shall have deceased at any time before the expiration of this trust, then two trustees will suffice, unless my daughter, Emily

Appleton Beebe, shall desire to appoint a third. I desire that this trust terminate ten years after the decease of my wife Emily, and the original trust fund be divided equally between my two children, Emily and William; unless either of them shall request a continuation of the trust under the same provisions as before, or with such changes as they and the trustees may agree upon, in which case I desire the trustees to continue the administration of the trust to such time as such child or children may wish. If either of my children die without issue before the termination of this trust, I wish one half part of the income he or she would receive if living be given to the surviving child, and the other half part to such charitable and educational purposes as my trustees shall see fit. If both children die without surviving issue, then I wish the whole income to be given to charitable and educational purposes, as before mentioned, and at the termination of this trust, if both children shall have died without issue surviving, I wish the property to be given to such charitable and educational purposes as the trustees think best, unless either child shall have left a wife or husband; then I desire the trustees to give to such wife or husband such proportion of the income or original fund as they think would be given by me if I were then alive. In witness whereof, I have set hereunto my hand and seal, this fourth day of December, eighteen hundred and seventy-six."

The widow and children of the testator are still living. The testator's son William had one child, still living, born in 1879, while the testator's daughter Emily had three children, still living, born respectively in 1872, 1878, and 1884. The plaintiffs agreed in writing, on September 22, 1888, to sell, and the defendant to purchase, the land in question, and on October 17, 1888, upon a tender by the plaintiffs of a deed thereof conveying a good title in fee simple, the defendant refused to accept and pay for the same. The prayer of the bill was that the agreement of September 22, 1888, might be specifically performed by the defendant, and the price agreed upon be paid by him to the plaintiffs.

The answer alleged the following facts. On April 8, 1878, Burnham, Dexter, and William Appleton, Jr., upon a petition to the Probate Court filed by them on that day to be appointed

trustees under the will, and in accordance with their request and that of the widow and the two children of the testator, who alleged that they were all the persons interested in the trust, were appointed as such trustees without further notice, and were exempted from giving any surety or sureties on their official bond. Subsequently Burnham died, and Herbert C. Mason, and afterwards, on November 18, 1884, upon Mason's death, J. Morris Meredith, successively filed petitions to the Probate Court to be appointed to fill the vacancy thus caused, and in each instance, upon a request by the widow and the testator's two children only, being all the "persons interested in said trust," as they alleged, first Mason, and then Meredith, was appointed, without further notice, upon the giving of a personal bond only, without sureties. The will of the testator did not exempt the trustees from giving a surety or sureties on their bond, or provide that no bond should be required.

The defendant contended that all persons beneficially interested in said trust did not request that the trustees should be exempt from giving any surety or sureties on their bonds; that the plaintiffs, or any or either of them, were not duly qualified to act as trustees under the will, by reason of their never having given notice of their several petitions as required by law, and of their not having filed a bond with surety or sureties; that they were not seised of such personal and real estate, and could not convey to him a good merchantable title to such personal property; and that he was not bound to accept the deed and pay the consideration money therefor.

Hearing on the bill and answer before *W. Allen, J.*, who reserved the case for the consideration of the full court.

S. Bartlett, for the plaintiffs.

F. C. Welch, for the defendant.

MORTON, C. J. The statute provides that a trustee may be exempt from giving sureties on his bond when the testator so orders or requests, and "any trustee shall, except as aforesaid, be so exempt when all the persons beneficially interested in the trust, being of full age and legal capacity, request such exemption." Pub. Sts. c. 141, § 16. This is a re-enactment of the St. of 1873, c. 122, § 1, under which the trustees in this case were appointed. The plaintiffs contend that this statute should

be construed as if it read like the provisions upon the kindred subject of the bonds of executors and administrators, that a trustee shall be exempt when all persons interested in the trust, who are of full age and legal capacity, request such exemption. See Pub. Sts. c. 129, § 8; St. 1885, c. 274. But we have not found it necessary to decide the question whether the statute would apply to a case where there were living parties interested in the trust who have a vested interest and who are not of full age and legal capacity.

In the case before us, under the will of the testator, the only parties who have any vested interest in the trust fund are the widow and two children of the testator. His grandchildren have no interest. The will provides that the trust shall terminate ten years after the death of his widow, when the fund is to be divided between the two children, if living. If both are then dead, leaving no issue surviving, the fund is to be "given to such charitable and educational purposes as the trustees think best, unless either child shall have left a wife or husband; then I desire the trustees to give to such wife or husband such proportion of the income or original fund as they think would be given by me if I were then alive."

The words of the statute, "all the persons beneficially interested in the trust," mean all persons who have a present vested interest, and are not intended to include all persons who may possibly become interested in the future. When the Legislature deals with the rights of parties not in being, or not ascertained, who may have a contingent interest in a trust, or, for instance, in the case of a sale of the trust estate, it uniformly speaks of them as parties who "may become interested." Pub. Sts. c. 141, § 21; c. 120, § 20. Such parties would not accurately be described as "persons interested," as that expression imports persons in being who have a vested interest. In this case, as all the parties interested requested the exemption, it was in the power of the Probate Court to exempt the trustees from giving sureties on their bonds, and the appointment of the trustees was valid.

The defendant contends that the appointment of one of the present trustees, who was appointed to fill a vacancy caused by death, is invalid, because no notice was given upon the petition for

his appointment, as required by the Pub. Sts. c. 141, § 5. This statute provides that the Probate Court "shall, after notice to all persons interested, appoint a new trustee." But this notice "may be dispensed with when all parties entitled thereto signify in writing their assent to such proceedings or waive notice." Pub. Sts. c. 156, § 87. In this provision, as in the one we have before discussed, "all persons interested" does not include persons not in being, but only those in being who have a vested interest, and the record shows that all such persons signified in writing their assent to the proceedings. The statutes were complied with, and we need not consider whether, if they had not been, the defendant could take advantage of this irregularity in the proceedings.

Decree for the plaintiffs.

R. F. M. ATWOOD vs. ELBRIDGE WHEELER & others.

Suffolk. March 11, 1889. — May 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Poor Debtor — Arrest on Execution — Affidavit — Citation — Recognizance.

The affidavit required by the Pub. Sts. c. 162, § 17, when a creditor applies for the arrest of his debtor on execution, is the foundation of the proceedings; and if such an affidavit, which is to the first charge therein specified, is not made until after the magistrate, as required by § 18 in case of such charge, issues notice to the debtor, and until after the return hour of the citation, the citation is issued without authority, the subsequent arrest of the debtor is illegal, and a recognizance entered into by him is void, and no action can be maintained upon it.

HOLMES, J. This is an action upon a poor debtor recognizance, given under the Pub. Sts. c. 162, § 28. The defendant Wheeler was arrested on an execution dated June 10, 1887. The affidavit required by the Pub. Sts. c. 162, § 17, was to the first charge there specified, that the debtor had property not exempt from being taken on execution, which he did not intend to apply to the plaintiff's claim. The citation required by § 18 in the case of that charge was issued on June 13, while the affidavit just mentioned was not made until June 17, after the

return hour of the citation. The defendant appeared after the return hour, and after he had been defaulted, submitted to arrest, and recognized. But it is found that there was no waiver, as he and his sureties were ignorant that the affidavit had not been made before his appearance, and believed that he was liable to arrest. See *Francis v. Howard*, 115 Mass. 236; *Lane v. Holman*, 145 Mass. 221, 223.

We see no ground to disturb this finding, so that the only question is whether the citation was issued without authority and the arrest was illegal, in which case the recognizance is void. *Smith v. Bean*, 130 Mass. 298. *Newmarket National Bank v. Cram*, 131 Mass. 204.

It is argued that issuing notice is only a ministerial act, and is shown to be so by the fact that it may be done by justices of the peace, except in the county of Suffolk, although they are denied authority to examine the debtor (§§ 18, 27). The affidavit, on the other hand, it is said, and proving to the satisfaction of the magistrate, as required by § 17, go together, and the affidavit is evidence which does not become important until the time comes to settle the judicial question whether the proof is made out and a certificate authorizing the arrest of the debtor ought to issue.

But even the power to issue notice is confined, by § 18, to magistrates authorized by §§ 17, 1, to issue a certificate authorizing an arrest. Justices of the peace, except in Suffolk, are authorized to issue such a certificate in any case not requiring notice, that is to say, upon any charge except the first, and upon the first if there is an affidavit and proof that there is good reason to believe that the debtor intends to leave the State (§§ 17, 25). *Frost's case*, 127 Mass. 550, 552. *Carleton v. Akron Sewer Pipe Co.* 129 Mass. 40, 42. In all these cases their function is judicial, so that the argument based upon their power to issue notice does not amount to much.

On the other hand, a reading of § 17 and the reason of the thing make it very plain that the affidavit is the foundation of the proceedings for arrest after the execution is issued. The affidavit determines what the charge is, and whether notice is necessary. The charge does not exist until the affidavit is made in which it is "contained," in the language of § 17. Until the

charge is made, the magistrate cannot entertain an application for a certificate, because the certificate applied for is "that he is satisfied there is reasonable cause to believe the charges therein [i. e. in the affidavit] contained, or some one of them, are true." The conclusion from the words of the statute is justified by good sense, as well as by the letter of the law. The making of the affidavit is some security to the debtor against being vexed with unfounded notices, which he would neglect at his peril, as in other cases it is some security against his being arrested illegally.

It is suggested that the papers in *Stewart v. Griswold*, 134 Mass. 391, disclose that the affidavit in that case was subsequent to the notice. But no such point was taken, or was open upon the report to this court. The ruling of the court below, that the recognizance was invalid, was correct.

Judgment for the defendants.

T. E. Barry, for the plaintiff.

J. G. Robinson, for the defendant.

SOPHRONIA FROST vs. CLARENCE A. SUMNER.

Middlesex. March 13, 1889. — May 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Personal Services — Legacy — Evidence — Accord and Satisfaction.

In an action for a legacy and for services rendered the testator by the legatee as housekeeper and nurse, evidence was admitted that before the testator's death it was agreed between them that he would leave her the legacy and that she would accept it in payment for her services; and she obtained a verdict for the legacy alone. *Held*, that the evidence was competent to disprove the contract declared on.

CONTRACT against the defendant as executor of the will of Charles A. Frost. The declaration contained two counts, the first one to recover the sum of one thousand dollars, the amount of a legacy to the plaintiff in the will, and the second, upon an account annexed, to recover six hundred and twenty-four dollars for the services of the plaintiff rendered to the testator for

six years, at two dollars per week. The answer admitted that the testator by his will left the legacy to the plaintiff, as alleged in the first count of the declaration, and that the same was due, but set up that the legacy was inserted in the will, and was made to the plaintiff in satisfaction of all claims which she might have upon him for services, and was accepted by her as such by an agreement between the plaintiff and the testator during his lifetime.

At the trial in the Superior Court, before *Bishop J.*, it appeared that the plaintiff, who was the sister-in-law of the testator, had served in his family for sixteen years as housekeeper; that she had performed various services, and had had her living and support, except clothing, which she had furnished herself, but had never been paid anything for her services; that her services were worth two dollars per week in addition to her living; but the plaintiff did not claim, nor was there any evidence, that there was an express contract to pay for such services.

The defendant offered evidence of conversations between the plaintiff and the testator, and between the testator and third persons in the presence of the plaintiff, about the time the will was made and shortly before his death, tending to show an understanding between them, that, if he would make in his will a legacy of one thousand dollars to her, she would accept the same as a payment for her services; that she expressed to the testator and other persons satisfaction with the legacy as payment; and that the testator gave her the legacy in pursuance of such understanding. The plaintiff's counsel objected to the admission of this evidence, and contended that the provisions for the plaintiff in the will were a gift from the bounty of the testator, and that the intention of the testator in this matter could not be proved by parol evidence, but must be derived from the will itself.

The presiding judge overruled the objection, and admitted the evidence, and the plaintiff excepted. The jury returned a verdict for the plaintiff for the amount of the legacy and interest only; and the plaintiff alleged exceptions.

H. L. Parker, for the plaintiff.

S. H. Tyng, for the defendant, was not called upon.

HOLMES, J. The first count of the declaration is for a legacy of one thousand dollars, and on this the plaintiff had a verdict.

The second count is for services rendered the defendant's testator, the plaintiff's brother-in-law, by keeping house for him and nursing him. The defendant introduced evidence that before the testator's death it was agreed between the testator and the plaintiff that he would leave her a legacy of one thousand dollars, and that she would accept the same in payment for her services. The admission of this evidence was excepted to, on the ground that it contradicted the presumption arising on the face of the will that the legacy was a gift.

The objection is beside the point. The evidence was introduced, not to affect the construction of the will, but to disprove the contract declared on by the plaintiff. *Phipps v. Mahon*, 141 Mass. 471. *Starratt v. Mullen*, 148 Mass. 570. For the defendant's purpose, probably it did not matter whether the testator had kept his agreement or not. *Baxter v. Gray*, 3 Man. & Gr. 771. *Osborn v. Governors of Guy's Hospital*, 2 Str. 728. Compare *Miller v. Lash*, 85 N. C. 51. At all events, the evidence, if believed, showed that at the time of the testator's death the only outstanding contract to pay the plaintiff for her services was the contract to leave her the legacy, and that this was the only contract under which a part at least of the services were rendered originally.

It is unnecessary to consider whether there was any evidence of an implied contract before the express agreement was made. See *Bundy v. Hyde*, 50 N. H. 116. For that question would only be material if the ground of exception had been that it was impossible to substitute the promise to leave a legacy for a debt upon an executed consideration, even when, if the debt was not disputed, the amount due was unliquidated, and a part of the consideration for the promise was services rendered after it was offered. No such suggestion has been made, and we do not mean to give it any countenance. See *Wellington v. Apthorp*, 145 Mass. 69; *Savage v. Blanchard*, 148 Mass. 348.

Exceptions overruled.

MIDDLESEX COMPANY *vs.* CATHERINE LANE & another.

Middlesex. March 29, 1889. — May 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Adverse Possession — Consent of Person disseised — Mill-Pond.

The consent of a person disseised is not necessary to the acquisition of a title by adverse possession.

If the owner of a dam and of a mill-pond raised thereby and of the land under it is disseised of a portion of the land, no declaration of the abandonment by him of the right to flow such portion is necessary to prevent the acquisition of title to it by adverse possession.

BILL IN EQUITY to restrain the defendants from filling the mill-pond of the plaintiff, and to compel them to remove material already deposited in the pond. Hearing upon the pleadings and a master's report, before *Holmes, J.*, who, at the request of the parties, reserved the case for the consideration of the full court, in substance as follows.

The master found the following facts. The plaintiff, a manufacturing corporation, was the owner of the mill-pond in question, which was raised by its dam, and of the land under the pond, and for thirty years and more had constantly used the water power thus created for manufacturing purposes. The plaintiff originally owned a strip of land upon the shore of the pond extending to a former water-line of the pond, and marked A upon a plan annexed to the report. The plaintiff had lost title to this strip of land by adverse possession, and it was owned by the defendants. The pond along the water side of the lot marked A was gradually filled by the acts of the defendants and their predecessors in title, among others, until another lot of land, marked B upon the same plan, was gradually formed in the pond adjoining the lot marked A, and extending from it into the pond.

The defendants claimed title to lot B by adverse possession, having had for more than twenty years before the filing of the bill, with their predecessors in title, the visible, notorious, distinct, and absolute adverse possession of the lot. The plaintiff has throughout this period of time, and prior thereto, continued to

use its pond to supply water power, and had done no positive act indicating an intention to abandon in any wise any of its rights.

The master declined to rule, as requested by the plaintiff, that where the ownership of the land flowed by a mill-dam is in the owner of the mill-dam, the mill, and the water privilege, and an artificial pond is created, title by adverse possession is not possible, unless continued upon the land made by the filling in by the mill-pond for twenty years, coupled with an abandonment of the mill-dam and water privilege by the mill-owner for the same period of time, accompanied with a declaration of abandonment to the party occupying the filled land adversely.

B. F. Butler & P. Webster, for the plaintiff.

C. Cowley, for the defendants.

HOLMES, J. This is a bill brought to restrain the defendants from filling the plaintiff's mill-pond, and to compel them to remove earth by which a portion of the pond has been filled in. The master finds that the defendants own one lot of the land in question, styled lot A, and that they and their predecessors in title for more than twenty years before the filing of the bill in this case had the visible, notorious, distinct, and absolute adverse possession of another lot, styled lot B, which previously belonged to the plaintiff. This imports that the plaintiff was excluded from the premises, and no declaration of abandonment on its part was necessary in order to bar its title. The characteristic case of title by adverse possession is when it is acquired without the consent and against the will of the former owner. The evidence on which the master found as he did is not before us, so that much of the plaintiff's argument is beside the mark. If the land had belonged to the defendants before the filling, and they had built a dam excluding the plaintiff's water, the plaintiff's right of action (if it would have had one, *Storm v. Manchaug Co.* 13 Allen, 10, *Isele v. Arlington Five Cents Savings Bank*, 135 Mass. 142) would have been barred in twenty years, as in other cases of an interrupted easement. *Smith v. Langewald*, 140 Mass. 205, 207. In the present case the land had belonged to the plaintiff, the plaintiff was excluded from the land and from the exercise of the right of flowage incident to its title at the same time, and lost all rights together.

Bill dismissed.

MIDDLESEX COMPANY vs. DENNIS McCUE.

Middlesex. March 29, 1889. — May 6, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Nuisance — Surface Drainage — Cultivation of Land.

The owner of land upon the slope of a hill running down to a mill-pond may cultivate and fertilize it in the ordinary way for garden purposes without becoming liable to the owner of the pond, which is encroached upon so as to diminish the water power by the large amount of solid matter thereby constantly carried into the pond by surface drainage.

BILL IN EQUITY to restrain the defendant from filling the plaintiff's mill-pond, and to compel him to remove material already deposited in it. Hearing upon the pleadings and a master's report, before *Holmes, J.*, who reserved the case for the consideration of the full court, in substance as follows.

The master's report contained the following facts. The plaintiff, a mill corporation, was the owner of the mill-pond in question, which was raised by its dam, and of the land under the pond, and for thirty years and more had constantly used the water power thus created for manufacturing purposes. The defendant was the owner of land upon the side of a hill sloping down to the pond as far as the land of the plaintiff. The defendant had annually used and cultivated his land, in the ordinary way, to within a short distance from the plaintiff's land, for the purpose of raising garden vegetables, and had brought thereon manure and ashes, which he had dug and spaded into the soil. The defendant had erected neither a fence nor a wall to prevent the filling of the plaintiff's pond, or to prevent the raising of his own land, which the plaintiff had the right to flow, or for the purpose of banking against further flowage.

The plaintiff contended that the defendant, by cultivating the land, had changed the character of the soil, had caused it to wash into its mill-pond, and that the land could not be legally so used if it interfered with the plaintiff's rights of flowage, and caused the filling up of its mill-pond.

The master found that, although in fact the cultivation of the land did cause a raising of the land near the shore of the plaintiff's pond, and a filling up of the pond, it was such a use of the land as might be legally made; and ruled that the defendant might, as he had done, cultivate his land, and apply ashes and other fertilizers in the ordinary course of husbandry.

B. F. Butler & P. Webster, for the plaintiff.

C. Cowley, for the defendant.

HOLMES, J. This is a bill brought to restrain the defendant from filling up the plaintiff's mill-pond. The master reports that the defendant's land is on the slope of a hill running down to the pond, and that the only acts of the defendant tending to fill the pond have been those of cultivating and manuring his own soil in the ordinary way, for the purpose of raising garden vegetables. The question is whether the defendant has a right to do these acts notwithstanding their effects upon the plaintiff's land and water rights.

The respective rights and liabilities of adjoining landowners cannot be determined in advance by a mathematical line or a general formula, certainly not by the simple test of whether the obvious and necessary consequence of a given act by one is to damage the other. The fact that the damage is foreseen, or even intended, is not decisive apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass. *Rideout v. Knox*, 148 Mass. 868. Liability depends upon the nature of the act, and the kind and degree of harm done, considered in the light of expediency and usage. For certain kinds there is no liability, no matter what the extent of the harm. A man may lose half the value of his house by the obstruction of his view, and yet be without remedy. In other cases his rights depend upon the degree of the damage, or rather of its cause. He must endure a certain amount of noise, smells, shaking, percolation, surface drainage, and so forth. If the amount is greater, he may be able to stop it, and to recover compensation. As in other matters of degree, a case which is near the line might be sent to a jury to determine what is reasonable. In a clear case it is the duty of the court to rule upon the parties' rights.

The present case presents one of these questions of degree. If the plaintiff were complaining of offensive drainage from a vault, it would be entitled to recover upon proof of the fact. *Ball v. Nye*, 99 Mass. 582. If it complained that the surface drainage was made offensive by the nature of the substance spread by the defendant upon his land, the case would be nearer the line, and the right to recover possibly might depend upon further circumstances, such as whether the substances were usual and reasonable fertilizers, or refuse, etc. See *Brown v. Illius*, 27 Conn. 84, and 25 Conn. 583. In this case it complains, not that the substances brought down are offensive, but that the defendant causes any solid substance to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it if the earth is made friable by digging. This would cut down the defendant's right of surface drainage to a very small matter indeed. We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may. The plaintiff says that a wall would stop the trouble. If so, it can build one upon its own land. *Dickinson v. Worcester*, 7 Allen, 19. *Flagg v. Worcester*, 13 Gray, 601, 607. *Parks v. Newburyport*, 10 Gray, 28. *Cassidy v. Old Colony Railroad*, 141 Mass. 174.

Bill dismissed.

MARY A. BARNES & another vs. THOMAS D. BOARDMAN
& others.

Essex. November 9, 1888. — May 9, 1889.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

*Devise — Sale for Taxes — Assignment of Mortgage — Words of
Inheritance — Authority of Agent.*

A testator gave to his wife absolutely, in the first clause of his will, "my dwelling-house as now stands, together with all the land, furniture," and other personal property, and in the last clause, "all the rest, residue, and remainder of my personal and real estate, goods and chattels, . . . during her life," and appended to the will were the words, referring to the last clause, "during her life only, — my will and desire." *Held*, that the wife took the dwelling-house and the land connected with it in fee, but had a life estate only in the rest of the testator's real estate.

A collector's sale of several distinct and separate lots of land for the non-payment of taxes was *held* to be for one integral price, and therefore void.

If a mortgagee of land, by a single instrument duly executed under seal and acknowledged, makes an absolute assignment of the mortgage debt and of the mortgage, such assignment is sufficient to vest in the assignee the full legal title of the mortgagee to the mortgaged premises, although no words of inheritance are used.

The authority of an agent to act for the assignee of a mortgage in making an entry for the purpose of foreclosure was *held* to be sufficiently shown.

PETITION for partition of four parcels of land on Howard Street and Hampshire Street, formerly North Oak Street, in Lawrence. The case was submitted to the Superior Court, and, after judgment for the respondents, to this court, on appeal, on an agreed statement of facts, in substance as follows.

The petitioners were the children and heirs at law of Charles W. Boardman, a son of Benjamin G. Boardman, senior; and the respondents were the legal representatives of Benjamin G. Boardman, junior, of Edwin A. Boardman and of Moses B. Boardman, the remaining sons of Benjamin G. Boardman, senior, of whom only the children and heirs at law of Benjamin G. Boardman, junior, resisted partition.

Benjamin G. Boardman, senior, died on March 10, 1858, leaving a widow, Sarah W. Boardman, who was his second wife, and the four sons above mentioned, who were his children by

his first wife. His will, which was duly admitted to probate, contained the following provisions :

" Firstly, I give to my wife, Sarah, my dwelling-house as now stands, together with all the land, furniture, silver plate, spoons, notes, mortgages with the notes to the same, my books, papers, etc., chattels, at the time of my decease." Here followed a small appropriation to keep the testator's burial lot in order, and various legacies to his four sons. " My will and desire is, if my wife, Sarah, should be married again, and not remain my widow, that my real and personal estate shall revert to my heirs at law. My will is, that my wife, the executrix, shall from time to time present as gifts from me, and through her, to my grandchildren, as her judgment may dictate ; also to my sons, as her pleasure may dictate. I submit all to her own judgment, and confide in her to make any small presents. My estate can be closed without much expense, as no appraisement will be made. And lastly, as to all the rest, residue and remainder of my personal and real estate, goods and chattels, of what kind and nature soever, I give and bequeath the same to my said wife, Sarah, during her life only, whom I hereby appoint sole executrix of this my last will and testament. The words ' estate ' and ' real ' interlined by me before signed. My desire to your Hon. that you request no bondsman from my wife, as no mistake in the trust and discharge of her duty. Benjamin Greenleaf Boardman.

" In witness whereof, I have hereunto set my hand and seal, and publish and declare this to be my last will and testament, in the presence of the witnesses named below, this nineteenth day of July, in the year of our Lord one thousand eight hundred and fifty-two. Benjamin Greenleaf Boardman.

" Before signed, during her life only, — my will and desire."

Here followed the usual attestation clause, duly signed by three witnesses, and a codicil of later date diminishing the legacy to his son Charles W. Boardman.

Benjamin G. Boardman, senior, at the time of his death, owned a dwelling-house on Ashland Street, in Boston, and land on other streets in that city, as well as in Lawrence. Three of the parcels of land in question, being those situated on Howard Street in Lawrence, were owned by him at that time ; but his ownership of the fourth parcel, which was situated on Hamp-

shire Street, formerly North Oak Street, was controverted by the respondents. Sarah W. Boardman, who died on March 2, 1884, conveyed to Benjamin G. Boardman, junior, the dwelling-house in Boston, and "also all interest, if any, in real estate in State of Massachusetts, city of Boston or county of Suffolk," but made no other conveyance of the lands in question.

In 1857 the parcels of land on Howard Street, consisting of three distinct and separate lots, were collectively designated on the books of the assessors of taxes of the city of Lawrence as "Lot No. 10 Howard Street," solely with reference to certain plans of the assessors, and as being all of them situated on that street; and the fourth parcel, composed of two adjoining lots on North Oak Street, afterwards called Hampshire Street, were designated as "Lots No. 112 and 113 North Oak Street." On May 1, 1857, taxes were assessed to Benjamin G. Boardman, senior, upon these four parcels of land among others, those upon the three lots on Howard Street being separately assessed to him, and those upon the two lots on North Oak Street being assessed together. The taxes were duly committed to the collector of taxes of Lawrence for collection, and remained unpaid. Subsequently, the collector duly published a notice, dated May 28, 1859, and signed by him as collector, which notice was as follows:

"The owners and occupants of the following described parcels of real estate, situated in the city of Lawrence, in the county of Essex and Commonwealth of Massachusetts, are hereby notified that the taxes thereon severally assessed for the different years specified, according to the list committed to me as collector of taxes for said city by the assessors of taxes, remain unpaid, and that said parcels of real estate will be offered for sale at public auction on Saturday, the sixteenth day of July next, at ten o'clock in the forenoon, at the City Hall in said Lawrence, for the payment of said taxes, together with all the costs and charges thereon, unless the same shall be previously discharged."

Appended to this notice, under the heading "Non-residents," was the following: "Boardman, Benj. G., Boston, Lot No. 10 Howard Street, tax for 1857, \$6.15; Lots No. 112 and 113 North Oak Street, tax for 1857, \$0.48"; and an affidavit of one Dike, that between May 28, 1859, and July 16, 1859, he posted a copy

of the notice upon each of the lots, as well as in the City Hall, at least three weeks before the day of sale.

The sale by the collector occurred at the time and place stated in the above notice, and was by public auction, and the lots in question were struck off to Benjamin G. Boardman, junior, as the highest bidder therefor, and subsequently the collector gave to him a deed, dated July 19, 1859, duly signed, sealed, and acknowledged by the collector, and duly recorded, which deed, so far as material, was as follows :

“ Whereas the assessors of the city of Lawrence have assessed the sum of six dollars and fifteen cents on Lot No. 10 Howard Street, the sum of forty-eight cents on Lots No. 112 and No. 113 North Oak Street, . . . against Benjamin G. Boardman of Boston, as being the owner in possession on the first day of May, A. D. 1857, of said lots of land, situated in said Lawrence, for a tax in said city of Lawrence, in the lists of assessments they have committed to me to collect, and no person having appeared to discharge the same, although I have fully complied with all the provisions of the law respecting the sale of real estate for taxes assessed thereon and unpaid, therefore know ye, that I, the said Nathaniel Wilson, collector of taxes as aforesaid, in consideration of nineteen dollars and thirteen cents to me paid for the discharging of said taxes and intervening charges by Benjamin G. Boardman of Boston, in the county of Suffolk, in said Commonwealth, (late of the firm of Dennie and Boardman,) the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell, and convey unto him, the said Benjamin G. Boardman, his heirs and assigns forever, the following described real estate, being the land taxed as aforesaid, to wit, all those certain lots of land in said Lawrence, as above named, to wit, Lot No. 10 Howard Street, Lots No. 112 and 113 Oak Street, . . . said lots being so known and designated on the city assessors’ plan of lands in said Lawrence ; no person appearing to take a less quantity of said lots for said taxes and charges. An advertisement for the sale of which for the non-payment of said tax and incidental charges I caused to be published three weeks successively in” certain newspapers, “all published in said Lawrence, the last publication being more than one week before the day of sale ; also, a notice of the time, place, and cause of said sale of said real

estate was posted at the City Hall and other public places in said city, and also upon the real estate, three weeks before said day of sale, the same having been struck off to the said Benjamin G. Boardman, he being the highest bidder therefor, at a public auction, legally notified and held at the City Hall in said Lawrence, July 16, A. D. 1859. To have and to hold the same to the said Benjamin G. Boardman, his heirs and assigns forever, to his and their use forever, subject however to the right of redemption of the owner or proprietor thereof, according to law. And I do covenant with the said Benjamin G. Boardman, his heirs and assigns, that I gave notice of the intended sale of said land according to law, and that I have observed the directions of the law in all respects in the premises, in reference to advertising, posting, selling, and conveying the premises aforesaid. In witness whereof, I have hereunto set my hand and seal, this nineteenth day of July, A. D. 1859."

There was no other evidence as to the manner and form of the tax sale except as above stated and contained in the tax deed and notice of sale.

Prior to 1848 the fourth parcel of land, referred to as "Lots 112 and 113 on North Oak Street," was mortgaged by one Foley, who then owned it, to Joseph Gass, and on February 26, 1848, Gass delivered to Benjamin G. Boardman, senior, an instrument signed by him, and duly sealed, attested, acknowledged, and recorded in the registry of deeds, which instrument is as follows:

"Know all men by these presents, that I, Joseph Gass, within named, for and in consideration of the sum of ninety-six dollars paid me by Benjamin G. Boardman of said Boston, hereby transfer and assign to the said Boardman all the right, title, and interest which I have to the land described in the within deed of mortgage, and also all my right and title to the debt described therein. In witness whereof, I have hereunto set my hand and seal, this twenty-sixth day of February, A. D. 1848."

The records of the registry of deeds for the Southern District of the County of Essex also contained, as duly recorded, the following, signed and sworn to by two witnesses:

"This is to certify that Chas. S. Newell, attorney for Benjamin G. Boardman, the assignee within named, has this day

called upon us to witness his entry upon the premises described in the within mortgage, and he made entry thereon in our presence, and declared that he did it in the name and as the attorney of the within named Benjamin G. Boardman, for the purpose of foreclosing the within mortgage according to the statute, and for breach of condition thereof, this eighteenth day of October, in the year one thousand eight hundred and forty-nine."

The respondents contended that the assignment from Gass to Boardman conveyed only a life estate; that the certificate of entry did not state the facts required by the statute, and was insufficient to foreclose the mortgage, and that Newell was not authorized to make said entry; that the will of Benjamin G. Boardman, senior, devised to Sarah W. Boardman an estate in fee, and that the said petitioners did not inherit any portion of the real estate; that the tax deed was valid, and vested in Benjamin G. Boardman, junior, an estate in fee; and that the petitioners' remedy, if any, was in equity as cotenants.

The petitioners contended that Benjamin G. Boardman, senior, owned the premises at the time of his death; that the respondents were estopped from denying that he owned them at the time they were sold for taxes assessed to him as the owner in possession; that the assignment was sufficient to vest the mortgage deed and note in him; that the certificate conformed to the requirements of the statutes, and the mortgage was foreclosed thereby; that the lapse of time since the entry to foreclose, the acquiescence of all parties, the presumption of regularity in favor of ancient proceedings, the fact that the certificate was indorsed on the back of the deed and its subsequent record, justified and required a finding and ruling that Newell was the lawful attorney of Benjamin G. Boardman, senior, to make said entry; that the children of Benjamin G. Boardman, senior, were tenants in common and joint devisees of the premises under his will, subject to a life estate in the widow, whereby their relations were of a fiduciary character, not allowing one of them stealthily to deprive the others of their title by secretly acquiring an adverse title; that, if the tax sale and deed were valid, the respondents can avail themselves of the same only to require contribution, and that partition can be decreed in this case upon condition that such contribution shall be made; that

the assessment, notice, sale, and deed were illegal and void; and that the petitioners were entitled to partition.

If upon the foregoing facts partition could be had, interlocutory judgment for partition was to be entered therefor; otherwise, judgment was to be entered for the contesting respondents.

C. U. Bell, (*A. D. Bosson* with him,) for the respondents.

B. B. Jones, for the petitioners.

C. ALLEN, J. 1. The respondents contend that the testator left all of his land to his widow, absolutely; and if this is so, the title of the petitioners to the lands of which partition is sought wholly fails. But such is not the true construction of the will. The two clauses most material to be considered are the following, one of which is near the beginning, and the other near the end of his will: "Firstly, I give to my wife, Sarah, my dwelling-house as now stands, together with all the land, furniture, silver plate, spoons, notes, mortgages with the notes to the same, my books, papers, etc., chattels, at the time of my decease. . . . Lastly as to all the rest, residue and remainder of my personal and real estate, goods and chattels, of what kind and nature soever, I give and bequeath the same to my said wife, Sarah, during her life only." And appended to the will are the words, with reference to the latter clause, "during her life only,—my will and desire." The testator owned the dwelling-house and other real estate. The words, "together with all the land," in the first clause, obviously mean all the land connected with or belonging to the dwelling-house. The two clauses stand perfectly well together. The first gives to her in fee the dwelling-house and the land connected therewith; the latter clause gives the other real estate to her for life, and leaves the remainder undisposed of. It follows that the petitioners are not cut off from maintaining their petition by anything contained in the will.

2. As to three lots of land described in the petition, the same being a portion of a larger lot known as No. 10 Howard Street, the respondents admit that they were owned by the testator at his decease, and that the petitioners are entitled to partition thereof, unless their title was devested by a sale for taxes to Benjamin G. Boardman, junior, the father of the respondents. The taxes were assessed in 1857, and the sale was made in 1859.

The assessments were made upon each of the three lots separately; but the petitioners contend that the sale was of the three lots together, for one integral sum. The respondents do not deny that the tax title was void if the sale was made in that manner, (*Hayden v. Foster*, 13 Pick. 492,) but contend that it does not appear that the sale was so made.

Owing to the lapse of time and other causes, it was found impossible to produce other evidence than what may be gathered from the collector's notice or advertisement and his deed. Upon examination of these, it appears to us that the three lots were sold together for one integral sum. The notice shows nothing either way, being consistent with either mode of sale. The deed recites but one sum as the consideration money paid "for the discharging of said taxes and intervening charges"; it also says, "no person appearing to take a less quantity of said lots for said taxes and charges," as if the lots, taxes, and charges all went together; it adds, "an advertisement for the sale of which for the non-payment of said tax and incidental charges I caused to be published," etc., as if the taxes on the several lots were all treated as one tax. "The sale" is also referred to three times in the singular number. We find nothing whatever to show that the lots were sold separately, unless it be the recital of the several assessments, and the covenant of the collector that he observed the directions of the law; but these are insufficient to outweigh the indications found elsewhere in the deed. We are therefore of opinion that the tax sale was void, and that the petitioners are entitled to partition of the three lots therein embraced; and this renders it unnecessary to consider the question, which has been argued, whether the respondents can avail themselves of a title so obtained by Benjamin G. Boardman, Jr., who was a tenant in common with Charles W. Boardman, under whom the petitioners claim.

8. In reference to certain other lots whereof partition is sought, namely, the two lots on North Oak Street, as it was formerly called, the respondents contend that the title thereto of Benjamin G. Boardman, senior, failed, so that none of the parties to the present proceedings appear to have any title, and that therefore the petitioners cannot maintain the petition for partition of the same. The title of said Boardman was derived as follows.

A former owner made a mortgage of the premises to Joseph Gass, who, on February 26, 1848, by an instrument under seal and subsequently acknowledged and recorded, assigned to said Boardman "all the right, title, and interest which I have to the land described in the within deed of mortgage, and also all my right and title to the debt described therein." From the words used, it would seem that this assignment was written upon the mortgage. The records in the registry of deeds contained a certificate that Charles T. Newell, attorney for Benjamin G. Boardman, the assignee of the mortgage, made an entry to foreclose the same on the 18th of October, 1848. The respondents object that the assignment of the mortgage conveyed to Boardman only a life estate in the mortgage and in the premises therein described; that the certificate did not state facts necessary to a foreclosure; and that no authority in Newell was shown, and none could be presumed, because it did not appear that possession had followed foreclosure. But none of these objections can avail.

The general rule is familiar, that an assignment or transfer of a mortgage debt carries with it an equitable right to an assignment of the mortgage. *Sturtevant v. Jaques*, 14 Allen, 523. *Morris v. Bacon*, 123 Mass. 58. *Batesville Institute v. Kauffman*, 18 Wall. 151. *Carpenter v. Longan*, 16 Wall. 271. In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. 2 Washb. Real Prop. (8d ed.) 114, 118, and cases there cited. This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity. *Wolcott v. Winchester*, 15 Gray, 461, 464. *Young v. Miller*, 6 Gray, 152. But a payment of the debt at or before its maturity divests the mortgagee of his legal estate, and the mortgagor is then in of his old estate, without any release and without any process for redemption; *Holman v. Bailey*, 3 Met. 55; and, under our system of foreclosing mortgages, a payment of the debt after its maturity has nearly or quite the same effect. Nothing being thereafter due to the mort-

gagee, he could obtain no conditional judgment in an action to foreclose, and therefore cannot maintain a writ of entry to foreclose, or entry for breach of condition. Accordingly, upon such payment the mortgagor can assert his title at law against a tenant of the mortgagee, and need not resort to equity. *Baker v. Gavitt*, 128 Mass. 93.

No case has been cited, and we have found none, where the effect of an assignment like that of Gass to Boardman has been considered. But it is plain that after making it Gass retained no title which he could assert in any form of proceeding. The whole beneficial interest was in Boardman. The utmost that could be considered as remaining in Gass was a bare technical title in the reversion after Boardman's death; and this it would have been his duty at any time upon request to convey to Boardman, without any further payment, or any terms or conditions whatsoever. There can be no doubt that the assignment was intended to convey the whole title of Gass. Under it Boardman had a right to demand and receive payment in full of the mortgage debt, for his sole use. By the bare act of payment of the mortgage debt to Boardman, the mortgagor would have regained title, as already shown, and the title of both Gass and Boardman would have been cut off. By a failure to make payment to Boardman within three years after an entry by him to foreclose, the right of the mortgagor to redeem the premises would be cut off. The assignment was under seal, and was duly executed and acknowledged; it included an absolute title to the mortgage debt, and we see no sufficient reason for holding that it did not also carry the whole title of Gass to the mortgaged premises, although it did not in terms run to Boardman's heirs. It is more in consonance with the true relations of the parties, and with substantial justice, to hold that when a mortgagee of land, by a single instrument duly executed under seal and acknowledged, makes an absolute assignment of his mortgage debt and of the mortgage, such assignment is sufficient to vest in the assignee the full legal title of the mortgagee to the mortgaged premises, although no words of inheritance are used.

No particulars have been specified in respect to which the certificate of entry by Newell was insufficient, except that it did not show his authority to act for Boardman. Such authority,

after this lapse of time, may be inferred from slight circumstances. Newell assumed to act for Boardman in making the entry; he had the mortgage in his possession, as is shown by the certificate upon it of his entry; taxes upon the lots were assessed to Boardman in 1857; and it was admitted as a fact, that Boardman owned the lots in fee at the time of his death, unless the respondents' objections to the assignment and certificate are valid. It is no more than a fair inference, that he claimed to be the owner. Moreover, the respondents themselves claim title to these lots, as well as to those on Howard Street, as their father did before them, under the sale for the tax thereon assessed to Boardman. The facts and circumstances sufficiently show Newell's authority in making the entry to foreclose.

The result is, that the petitioners are entitled to partition of all the lots embraced in their petition. *So ordered.*

LAWRENCE KYTE vs. COMMERCIAL UNION ASSURANCE COMPANY.

Suffolk. November 19, 1888. — May 9, 1889.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Fire Insurance — Massachusetts Standard Policy — Effect of Temporary Increase of Risk.

A policy of insurance, in the form prescribed by the Pub. Sts. c. 119, § 139, (St. 1887, c. 214, § 60,) against loss by fire upon a dwelling-house, provided that "this policy shall be void" if without the assent of the company the insured should cause an increase of risk. The insured, for a substantial portion of the term of the policy, used the premises for the illegal sale and keeping for sale of intoxicating liquors, but afterwards and before a loss by fire obtained a license to sell such liquors there. *Held*, in an action on the policy, that if the temporary illegal use of the property caused an increase of risk, the policy was not merely suspended during the continuance of it, but might be treated by the company as wholly void.

CONTRACT upon two policies of insurance, one upon a dwelling-house and the other upon a barn, in the form prescribed by the Pub. Sts. c. 119, § 139, (St. 1887, c. 214, § 60,) against loss by fire, each for three years, from January 24, 1881, and

April 2, 1881, respectively. Each policy contained the following provisions:

"This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, — or if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company, — or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, — or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, — or if, without such assent, the said property shall be sold, or this policy assigned, — or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, — or if it be a manufacturing establishment running in whole or part extra time, except that such establishments may run in whole or in part extra hours not later than nine o'clock P. M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon, — or if the insured shall make any attempt to defraud the company, either before or after the loss, — or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, — or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting."

The answer, among other things, set up that the policies were rendered void by an increase of risk caused by the plaintiff without the assent of the defendant.

Trial in the Superior Court, after the former decision, reported 144 Mass. 48, before *Blodgett*, J., who allowed a bill of exceptions, which, so far as material, was as follows.

At the commencement of the trial, the defendant waived every defence set up in its answer, except that the policy was rendered void by an increase of risk, before the dwelling-house

and the barn were damaged by fire, which occurred on November 16, 1883. The dwelling-house, which was in process of erection when the policy upon it was issued, contained sixteen rooms, one of which was finished and furnished by the plaintiff as a bar-room, and was occupied by him as a hotel; and the barn was situated near it. There was evidence tending to show that from April, 1882, to July, 1883, the hotel was used by the plaintiff for the illegal sale and keeping for sale of intoxicating liquors, such liquors being seized on the premises on April 7, 1882, and duly forfeited, and the plaintiff being convicted for the illegal sale of such liquors in April, 1883, and again in June of the same year.

The defendant offered evidence tending to show that there was a custom among fire insurance companies doing business in Massachusetts, for many years past, to charge a higher rate of premium for insurance on a building occupied by a person engaged in the business of a common victualler than on a dwelling-house; that a building occupied for the purpose of carrying on the business of a common victualler, and one occupied as an ordinary dwelling-house, belonged to different classes, it being the general custom of insurance companies doing business in this Commonwealth to charge two or three times as much premium on the former as on the latter, and that a much higher premium would be charged for insuring a building in which intoxicating liquors were illegally sold than on one of the same class in which they were not sold.

Upon the question whether the policy became void by reason of the use of the dwelling-house in 1882 by the plaintiff for the illegal sale of intoxicating liquors, the judge instructed the jury as follows:

“If it be assumed (and it may be for the purposes of this trial) that such illegal use would vitiate the policy and deprive the plaintiff of the right to maintain an action for a loss by fire while the building was being so used, still, if upon all the evidence in the case you find that that use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and that such illegal use ceased from and after the time when the plaintiff had a license authorizing him to sell intoxicating liquors, the fact that he made an illegal use of the

premises in 1882 will not deprive the plaintiff of the right to maintain the action. His right under the policy, if it was suspended while the illegal use of the building was being made, would revive when he ceased to use the building illegally."

The defendant asked the judge to give the jury the following instructions:

"1. If you find that during the time for which these policies were issued the circumstances affecting the risk were so changed by the plaintiff Kyte, in the use he made of this building, or in the use that others made of it with his knowledge and consent, that a higher rate of premium would be demanded in its altered state than in its original state, then this policy is void as to the plaintiff Kyte, and he cannot recover for his interest therein, although the fire did not occur from the alteration.

"2. Nor is the plaintiff Kyte entitled to recover for his interest if he thought this alteration in circumstances did not increase the risk, if in fact it did increase the risk.

"3. If you find that during the time for which these policies were issued the plaintiff Kyte, by obtaining a common victualer's license and making use of this building under said license, and legally or illegally selling intoxicating liquors therein, did increase the risk so that a higher premium must be paid for the insurance of this building thus used than for the insurance of a dwelling-house, then this policy becomes void as to the plaintiff Kyte, and he cannot recover for his interest therein.

"4. If you find that by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased, this policy is void as to the plaintiff Kyte's interest, and he cannot recover, although this increase was not permanent and did not cause the fire.

"5. If you find that while these policies were in force intoxicating liquors were illegally kept and sold in this building by the plaintiff Kyte, or with his consent or knowledge, and that thereby the risk was increased so as to require a higher premium for its insurance in the changed circumstances, this policy became void as to his interest, and he cannot recover.

"6. If you find that while these policies were in force the

plaintiff did obtain a common victualler's license, and make use of this building for this purpose, and if you find that a dwelling-house and a building occupied and used by a common victualler do not belong to the same class of insurance risks, and the latter requires the higher premium for insurance, then the plaintiff is not entitled to recover for his interest in this property, although the fire did not occur from the alteration."

The judge gave the second instruction requested, and also the third, with the exception of the words "so that a higher premium must be paid for the insurance of this building thus used than for the insurance of a dwelling-house," and the fifth, with the exception of the word "illegally" and the words "so as to require a higher premium for its insurance in the changed circumstances." The judge declined to give the first, fourth, and sixth instructions requested, saying with regard to the fourth instruction, "The fourth I shall decline to give; I have given what would be entirely inconsistent with it."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. B. Powers & S. L. Powers, for the defendant.

C. Q. Tirrell, for the plaintiff, cited *Fuller v. Ruby*, 10 Gray, 285, 288; *Worthington v. Bearse*, 12 Allen, 382; *Hinckley v. Germania Ins. Co.* 140 Mass. 88, 48; *Ring v. Phoenix Assurance Co.* 145 Mass. 426; *Schmidt v. Peoria Ins. Co.* 41 Ill. 295; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 129.

C. ALLEN, J. These policies were in the form of the Massachusetts Standard Policy, and each provided that "This policy shall be void . . . if, without such assent [namely, the assent in writing or in print of the company], the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, . . . or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law." Various other circumstances were enumerated which would also avoid the policy. At the beginning of the trial, the defendant waived every defence except increase of risk. The defence of the illegal keeping of intoxicating liquors, as a separate and distinct defence, was therefore waived.

We have to consider, in the first place, whether the instructions requested by the defendant were given in substance. The plaintiff contends that they were. The learned judge before whom the case was tried adopted in substance the third and fifth instructions asked for by the defendant, and thus instructed the jury, that if they should find that during the time for which these policies were issued the plaintiff Kyte, by obtaining a common victualler's license and making use of this building under said license, and legally or illegally selling intoxicating liquors therein, increased the risk, then this policy became void as to the plaintiff Kyte, and he could not recover for his interest therein; and if they should find that while these policies were in force intoxicating liquors were kept and sold in this building by the plaintiff Kyte, or with his consent or knowledge, and that thereby the risk was increased, this policy became void as to his interest, and he could not recover. This was a general and broad instruction, including the increase of risk by using the premises as a common victualling place, or as a place for selling intoxicating liquors legally or illegally, and well covered the general question of the effect of an increase of risk. From this instruction, taken alone, a jury might well have inferred that the policy would be void in case of any such increase of risk at any time during the time covered by the policies and before the fire.

But the defendant, in the fourth request for instructions, asked for a special instruction, adapted to the case of a temporary increase of risk which had ceased before the time of the fire; that is to say, that if the jury should find that, by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased, this policy would be void as to Kyte's interest, and he could not recover, although this increase was not permanent. The judge declined to give this ruling, and instructed the jury, in substance, that if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises in 1882, which was during the time covered by the policy, would not deprive the plaintiff of the right to maintain the action; and that his right under

the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. This instruction did not in express terms mention the subject of an increase of risk by the illegal use of the premises for selling liquor; but the instruction was given in place of the fourth request for instructions, and that request was refused, the judge saying that he had given what would be entirely inconsistent with it.

The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk. The provision is that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise till afterwards. They are of different degrees of importance, some of them going to the essential matters of the contract, and others being comparatively trivial in character. The language of the policy is the same in respect to them all, that the policy shall be void.

In *Hinckley v. Germania Ins. Co.* 140 Mass. 38, the policy was in the same form as those in the present cases, and for a short time during the term of the policy the plaintiff kept a bowling alley and billiard table without having any license therefor. There was no question of increase of risk, or other actual prejudice to the insurer; and under these circumstances two questions arose: first, whether the plaintiff's act fell within the provision that the policy should be void if gunpowder or other articles subject to legal restriction should be kept in a manner different from that allowed by law; and secondly, whether, assuming that the policy would be void during the time of the illegal keeping of the bowling alley and billiard table, it would revive after such temporary use had ceased. In deciding the case, the court intimated that the plaintiff's act was not within the meaning of the provision in the policy, unless the risk was thereby increased, but placed the decision upon the second ground, that the policy would revive. The court now thinks it would have been better to place the decision of

this part of the case solely upon the first ground, leaving it an open question whether a departure from the terms of the provision of the policy, without an increase of risk, may be deemed merely to suspend, and not absolutely to avoid the policy. However that may be, we think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company, it is not much different from a misrepresentation of the condition of the property.

If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of risk afterwards the policy should be void, it could hardly be doubted that the words should be taken in their natural, obvious meaning. The fact that with this are coupled the other provisions above referred to does not change its meaning with reference to the effect and consequence of an increase of risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the assured, and not disclosed and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk. *Lyman v. State Ins. Co.* 14 Allen, 329. *Mead v. Northwestern Ins. Co.* 7 N. Y. 530.

It follows, therefore, that the fourth instruction which was requested, or something in substance like it, should have been given. Upon the facts stated and assumed, the increase of risk, if there was one, continued for fifteen months, and could not be treated as a casual, inadvertent, or inevitable thing.

Exceptions sustained.

STEPHEN F. JONES vs. MICHAEL CAVANAUGH.

Suffolk. January 11, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Gaming — Bet upon Foot-race — Recovery by Loser — Demand.

A bet upon a foot-race between two is gaming, within the meaning of the Pub. Sts. c. 99, § 1, providing an action for the recovery back of money lost at gaming; a person bringing such an action to recover such a bet must show that he bet his money on the race, that he lost the bet, and that the defendant, acting by himself or an agent, was the winner.

If neither of the contestants wins the race, which is declared off, and the money remains in the hands of a stakeholder, no action can be maintained for its recovery from him without a previous demand.

CONTRACT to recover money paid to a pool-seller for the purchase of pools on a foot-race. Writ dated January 26, 1887. Trial in the Superior Court, before *Hammond, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered evidence, which was contradicted, tending to show that the defendant, on November 22, 1886, was a pool-seller at North Attleborough, at the race-course, where a foot-race was to take place between one Little and one Donlon; that the pools were sold at auction by the defendant, and that the plaintiff purchased of him ten pools for seven hundred and thirty dollars, which amount he paid to the defendant's clerk, who at the defendant's request kept the record of the pools sold, and received from him ten pool tickets; that the defendant's commission on the sales as pool-seller was five per cent; and that the pools purchased by him were on Donlon, to win against Little. The plaintiff contended and introduced evidence tending to show that the race was declared off by the referee; while the defendant contended and introduced evidence tending to show that the race was won by Little, and was so declared by the referee. No part of the money was paid back, and no demand was ever made upon the defendant.

The judge refused various requests by the plaintiff for instructions, and instructed the jury that betting upon a foot-race between two persons was gaming, within the meaning of the

Pub. Sts. c. 99, § 1; that in order for the plaintiff to recover under that section he must show that he bet his money upon the race; that he lost his bet; and that the defendant, acting by himself or his agents, was the winner; and further, that, in order to recover outside of the statute, the plaintiff must make a demand before bringing his suit.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. H. Mather, for the plaintiff.

O. A. Galvin & J. F. Cronan, for the defendant.

KNOWLTON, J. The court rightly instructed the jury, "that betting upon a foot-race between two persons was gaming, within the meaning of the Pub. Sts. c. 99, § 1; that in order for the plaintiff to recover under that section he must show that he bet his money upon the race, that he lost his bet, and that the defendant, acting by himself or his agents, was the winner." *Grass v. M'Elroy*, 1 Allen, 563. *Scollans v. Flynn*, 120 Mass. 271, 273. *McGrath v. Kennedy*, 15 R. I. 209.

The only remaining question in the case is whether the ruling "that, in order to recover outside of the statute, the plaintiff must make a demand before bringing his suit," was correct. The evidence to which the ruling applied presented two aspects. One was shown by the defendant's evidence that the race had been won by Little, and that the referee had so decided. The other appeared in the testimony of the plaintiff's witnesses that the race had been declared off by the referee.

As we understand the transactions, each pool was made of a sum of money risked by the plaintiff upon one of the contestants in the race, and of a sum risked by another person upon the other contestant, and the whole was received by the defendant as a stakeholder, to be paid, less a commission of five per cent, to the person whose money was risked upon the winner. The bill of exceptions does not state more particularly the details of their arrangement, but it is quite clear that, if Little had properly been adjudged to be the winner of the race, and if the defendant had paid over the amounts of the several pools to the persons who had risked their money on Little, there having been no revocation of his authority so to do, the plaintiff would have been without remedy against the defendant. *Fisher v. Hildreth*,

117 Mass. 558. *Patterson v. Clark*, 126 Mass. 581. If Little won the race, it is not contended that the plaintiff, before bringing the action, did anything to revoke the defendant's authority, or to render him liable to a suit.

If, on the other hand, neither of the contestants gained a victory, and the race was declared off, the defendant's authority to pay over the money in accordance with the original agreement terminated, and he was left with money in his hands to which the purchasers of the pools were entitled. Was he liable to be sued for it without a demand? That depends upon the nature of his undertaking. If he was a mere ordinary stakeholder, who agreed to hold money of betters and pay it over to the winner, it is clear that, when his right to pay under their agreement ceased, he was under no obligation to do an act of a different kind, and to seek out the original parties and return them their money. It was enough if he safely kept the money until it was called for. *McKee v. Manice*, 11 Cush. 357. *Fisher v. Hildreth*, 117 Mass. 558. *Morgan v. Beaumont*, 121 Mass. 7. *West v. Holmes*, 26 Vt. 530. *McGrath v. Kennedy*, 15 R. I. 209.

An agent who has his principal's money without instructions as to what to do with it, is not liable to a suit for it until it is demanded. But if the money paid to a pool-seller for pools is to be regarded as his own, received as the consideration of a contract afterward to pay over a stipulated sum to the winner in the pool, and if he is unable to perform his contract on account of the absence of the conditions in reference to which the contract was made, he has in his hands money received from others as the consideration of a contract whose consideration upon the other side has failed, and it then becomes his duty to return the money immediately, and he is liable to a suit for it without a demand. He is then in the position of one owing a debt which has become payable. *Lawrence v. Carter*, 16 Pick. 12. *Dill v. Wareham*, 7 Met. 438. *Earle v. Bickford*, 6 Allen, 549.

Upon the facts stated in the bill of exceptions, we are of opinion that the defendant was a stakeholder and an agent for a particular purpose; that the money which made up the several pools was not received by him as his own, but to be held and paid out for others; and that if he could not pay it as was expected, because the race was not run, he had no other duty in relation to

it than to keep it safely for those who were entitled to it. The ruling, that outside of the statute the action could not be maintained without a previous demand, was correct.

There is no occasion to consider the defendant's contention that the plaintiff's action is founded upon a violation of the St. of 1885, c. 342, and that he should therefore be precluded from recovering. See *Cardoze v. Swift*, 113 Mass. 250.

Exceptions overruled.

PELATIAH FLETCHER vs. FITCHBURG RAILROAD COMPANY.

Suffolk. January 15, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, HOLMES,
& KNOWLTON, JJ.

*Personal Injuries — Railroad Crossing — Traveller on Highway — Due Care
— Declaration — Averment of Negligence.*

A railroad, whose tracks ran easterly and westerly at a highway grade crossing, had at that point two main tracks within two side-tracks at the usual distance apart, west-bound trains using the northerly main track, east-bound trains the southerly one. A barn on the highway about thirty feet south of the crossing cut off at that point an extended view along the railroad to the east. The driver of a four-horse team whose horses were not afraid of cars approached the crossing from the south during the forenoon, and stopped his horses in the way opposite the barn near the crossing, just as a freight train was passing over it on the southerly side-track bound east. He was familiar with the crossing, and knew that there was no gate or flagman there, and that a passenger train from the east was due there daily at about that time. When the freight train had passed the crossing he at once started to cross, and had no sooner got far enough to be able to look past the freight train to the east than he saw right upon him the passenger train, which struck and injured him. *Held*, that he was not in the exercise of due care.

A declaration in an action against a railroad company for personal injuries alleged that while the plaintiff was driving on the highway at a crossing of the railroad at grade, and "in the exercise of due and ordinary care, the defendant, by its agents and servants, and by reason of the insufficient guard and protection at said crossing, negligently ran and drove an engine attached to a long train of cars against the plaintiff, and threw him violently to the ground, and seriously injured him in his person." *Held*, that the allegation of negligence was not restricted to neglect to furnish a gate or flagman.

TORT for personal injuries occasioned to the plaintiff by being struck by a locomotive engine belonging to the defendant, at a

highway crossing in Ayer. The first count of the declaration was as follows :

“ And the plaintiff says that the defendant is a corporation, owning and running a railroad between the city of Boston and the city of Fitchburg ; that while driving his team on the highway at a crossing known as Flanagan's on said railroad in the town of Ayer, in the exercise of due and ordinary care, the defendant, by its agents and servants, and by reason of the insufficient guard and protection at said crossing, negligently ran and drove an engine attached to a long train of cars against the plaintiff, and threw him violently to the ground, and seriously injured him in his person.”

Trial in the Superior Court, before *Thompson, J.*, who allowed a bill of exceptions, which so far as material was as follows.

Evidence was introduced tending to show the following facts. The defendant's railroad at this crossing ran east and west, and consisted of two main tracks, and two side-tracks, one of which was to the north and the other to the south of the main tracks, all four tracks being from six and a half to seven feet, or the usual distance, apart. Trains on the defendant's railroad coming from Boston and bound west took the north main track, and those east bound the south main track. The highway in question ran north and south, and crossed the railroad at grade at a point about half a mile to the east of a station of the defendant in Ayer. The southerly side-track of the railroad was connected with the south main track by a switch about twenty feet east of the crossing. The defendant maintained neither gates nor a flagman at this crossing. A barn was situated on the east side of the highway and south of the crossing, about thirty feet from the southerly side-track of the railroad. This barn, together with certain woods, cut off the view of persons travelling on the highway, and approaching the crossing from the south, along the railroad to the east, but such persons upon passing the barn would have an unobstructed view in that direction as far as a curve in the railroad, about twenty-three hundred feet distant. The driver of a four-horse team in passing this barn would, however, be unable to see along the tracks to the east, until his horses were nearly upon the crossing. On March 26, 1887, at about nine o'clock in the forenoon, the plaintiff, who

was engaged in drawing sand with a four-horse team from a sand-pit on the north side of the railroad over the crossing, approached it from the south, and in driving his team over the crossing was struck by the engine of a west-bound passenger train, receiving the injuries.

The plaintiff testified, on direct examination, that as he approached the crossing an east-bound freight train was upon the southerly side-track upon the crossing, and was backing up towards the station to get certain freight cars standing there; that as he came towards the crossing he held his horses down a little and brought his team to a standstill; that he could not see along the tracks to the east because of the barn; that presently the freight train, the cars having been attached to it, passed by the crossing towards the east; that as soon as it had passed by he started the horses over the crossing, and as soon as the rear cars of the freight train had passed along far enough so that he could look past that train towards the east, he saw the engine of the passenger train coming right upon him; that before he started across the tracks he had seen a west-bound freight train standing on the north main track at the Ayer station; and that, although he listened, he heard no warning signal of any kind.

On cross-examination, the plaintiff testified that, upon seeing the east-bound freight train on the crossing and backing up to attach the freight cars on the side-track, he stopped his horses, so that, as he sat upon the wagon, he was nearly opposite the barn; that his horses were not frightened at all, and he had driven up quite near to the crossing; that when he started his horses again the freight train, with the cars attached to it, "was going over and got over the crossing," and the rear car of the train had got "more than a car's length or two cars' length" beyond the crossing; that when he started up his horses the freight train was in such a position that he could not see along the north main track to the east; that he was very familiar with the crossing and the railroad at the point in question; that he did not know what train it was that struck him except as he had "been told since"; that he knew that for several years a morning train from Boston arrived regularly at Ayer about nine o'clock A. M.; that although he saw a west-bound

train standing at the station on the north main track, he did not rely on that fact in crossing, because he "was n't aware what time it was"; and that the day was a fair day with perhaps snow on the ground, but he had no recollection as to its being windy. The plaintiff also, on cross-examination, in reply to the question, "Why did n't you wait, before you started up, until this freight train was out of the way, so you could see whether anything was coming on the west-bound main track?" said, "Well, I took all the precaution that I could to look down there, and saw nothing, — I could n't say why I did n't wait till they went farther off"; to the question, "Why did n't you wait till that train had gone out of the way, so as to give you a view of the west-bound track?" he replied, "I could n't tell"; to the further question, "Then, for all you know, if you had waited a moment, till this freight train had gone down far enough, you would have had an unobstructed view of the main track?" he replied, "Certainly, if the freight train, — if I had stopped till it got farther out of the way, I could have seen"; and to the further question, "Can you tell the jury why you did n't wait to see if there was a train coming on this west-bound track or not, if you can?" he replied, "I am sure I never thought of that. I thought there was a chance to pass, and I went through there."

On re-direct examination, the plaintiff replied in the negative to the question, "You have been asked why you did n't stop till that freight train got out of the way; had you any reason to believe that a train was coming in the direction of Boston across that crossing?"

The defendant called as a witness the engineer of the passenger train which struck the plaintiff, who testified that he blew the whistle as he approached the crossing; that there was no freight train on the south main track or side-track bound east; that at the time there was a signal at the Ayer station for him to keep back his train, and he had shut off steam and was going at a rate of from eighteen to twenty miles an hour; and that he was looking along the track in front of him, but had no time after he saw the plaintiff's horses on the crossing to give a danger signal. The defendant also introduced evidence tending to show that the bell on the passenger engine was rung as it approached the crossing.

The judge refused to rule, as requested by the defendant, that "under the first count of this declaration the plaintiff cannot recover on the ground of any neglect on the part of the defendant, excepting the neglect to furnish a flagman or gate." The judge also refused to rule, as requested by the defendant, 'that upon the whole evidence the jury was not authorized to find a verdict for the plaintiff, and that there was no evidence that the plaintiff was in the exercise of due and ordinary care.'

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in January, 1889, and afterwards was submitted on the briefs to all the judges, except *C. Allen, J.*

G. A. Torrey, for the defendant.

F. S. Hesselbine & T. Curley, for the plaintiff.

KNOWLTON, J. The only important question in this case is whether there was any evidence that the plaintiff, at the time of the accident, was in the exercise of ordinary care.

Certain facts are undisputed. The plaintiff was on the south side of the railroad, driving a four-house team northward, going for a load of sand. There were two main tracks on the railroad at the crossing of the highway, and two side-tracks, one north and the other south of the main tracks. The distance between adjacent tracks was about six and a half or seven feet. On the south side of the railroad, and on the east side of the highway, was a barn thirty feet distant from the nearest side-track. A person driving northward on the highway, as soon as he had passed the barn, would have an unobstructed view along the defendant's track towards the east for a distance of over twenty-three hundred feet. The plaintiff was struck by the engine of a regular passenger train coming from the east on the north main track. The accident happened at about nine o'clock in the forenoon, and the plaintiff had known for some years that a passenger train from the east arrived there daily at about that time. He was also familiar with the crossing, and knew that no gate nor flagman was maintained there. There is some conflict of evidence as to the other facts; but according to the plaintiff's account, upon which alone he relies, a freight train had backed up over the crossing to get some cars which were

standing on the southerly side-track, and the plaintiff, as he was approaching the track, held his horses back a little, and just came to a stop as the train was passing over the crossing. When the cars got by the crossing he started to cross, and as soon as he got far enough across to enable him to look past the freight train, he saw the engine of the passenger train right upon him. He testified that, when he stopped his team for the freight train to pass, he was right opposite the barn; that when he started his team the freight train "was going over and got over the crossing"; that he could not say whether the rear car had got over "more than a car's length or two cars' length"; and that the freight train was in such a position that he could not see the northerly main track.

As a general rule, a person is not in the exercise of due care who attempts to cross a railroad track without taking seasonable precaution to assure himself by actual observation that there is no danger from approaching trains. It has been held in many cases that he cannot properly trust his sense of hearing alone, but must use his sight as well, if it is reasonably practicable so to do. *Butterfield v. Western Railroad*, 10 Allen, 532. *Allyn v. Boston & Albany Railroad*, 105 Mass. 77. *Wright v. Boston & Maine Railroad*, 129 Mass. 440. *Tully v. Fitchburg Railroad*, 134 Mass. 499. *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225. This rule has been held applicable where a plaintiff's attention has been diverted, or his view of a coming train has been obstructed by another train which has just passed. *Bancroft v. Boston & Worcester Railroad*, 97 Mass. 275. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137, 141. *Allerton v. Boston & Maine Railroad*, 146 Mass. 241. *Granger v. Boston & Albany Railroad*, 146 Mass. 276.

In the case at bar, the plaintiff was driving a heavy team; his horses, as he testified, were not frightened at the cars; there was no apparent excuse for haste; he stopped opposite the barn, where it was impossible to determine whether a train was coming from the east, and a delay of one or two minutes after the freight train had gone would have made the track visible by the corner of the barn towards the east for a long distance; but without any reason for so doing that can be discovered in the facts, or that he could give in his testimony, he drove upon the

track when it was impossible to use his sight for his protection, and when it was probably impossible to distinguish the sound of the coming passenger train from the noise of the intervening freight cars. This was an act which the general knowledge and experience of men at once condemn as careless. A majority of the court are of opinion that there was no evidence that he was in the exercise of due care.

The case is very different from *French v. Taunton Branch Railroad*, 116 Mass. 537, in which it appeared that the plaintiff was crossing a single track railroad, and, seeing that a freight train had just passed, did not look to see if another train was closely following it, and was struck by a car which had been detached to make a flying switch. So, too, in *Griffin v. Boston & Albany Railroad*, 148 Mass. 143, the plaintiff, having seen a freight train go by, was struck by cars following close behind it, which had accidentally become separated from the train. In each of these cases it was left to the jury to determine whether due care required the plaintiff to look for detached cars following immediately behind a passing train. The case at bar is also clearly distinguishable from *Hanks v. Boston & Albany Railroad*, 147 Mass. 495.

The rule as to looking for trains when about to cross a railroad, laid down in the cases which we have cited, prevails in nearly all the courts in this country. The material facts in *Marty v. Chicago, St. Paul, Minneapolis, & Omaha Railway*, 38 Minn. 108, were almost identical with those in the case at bar. It is said in the opinion, that, after the plaintiff "had crossed the track of the St. Paul and Duluth road, he came up to within about twenty-five feet of the westerly track of the defendant's road, which was used for incoming trains, and stopped to wait for the passing of a freight train then occupying the crossing and going into the city. This train obscured the view of the other track, and the plaintiff did not see or hear the approach of the outgoing passenger train due at or about that time at the crossing on its way east. But as soon as the freight train had passed, he immediately started up, and drove on the second track used for outgoing trains, and was intercepted by the engine of the passenger train. He knew that the easterly track was used for outgoing trains, and had before on several occasions seen two

trains there under similar circumstances, and knew that the trains there were frequent, and knew that a train went out in the evening, and that no flagman was stationed there. He testifies that he could not see the passenger train because the freight train was in the way, and he drove on behind the latter, so that he did not discover the approach of the engine till it was within a few feet of him. . . . He admits that but for the freight train the track could have been seen at least five hundred feet in the direction from which the passenger train came. . . . A trifling delay would have enabled him to look, and this precaution was the more important because the noise of the passing freight train would prevent him from hearing the approach of the other train. The evidence is clear, not conflicting, and the facts not complicated, and the case was properly passed on by the court, without submitting it to the jury."

So in *McCrory v. Chicago, Milwaukee, & St. Paul Railway*, 81 Fed. Rep. 531, where the plaintiff's view of the passenger train that struck him was cut off by smoke from a freight train which had just passed, the judge says that the plaintiff "must have known that there were two tracks, and that a train was liable to come on each track; and if, when approaching a track, he finds anything which temporarily obstructs his vision, it is his duty to wait until the temporary obstruction is removed. He cannot say, 'There is something temporarily obstructing my vision, but I will take it for granted that there is no danger' and undertake to cross the track. . . . The law lays it down clearly that a man must look and listen. And if, by looking and listening, he could ascertain the approach of a train, and failed to do so, he is guilty of contributory negligence, and cannot recover." See also *Cincinnati, Hamilton, & Indianapolis Railroad v. Butler*, 103 Ind. 31; *Stubley v. London & North Western Railway*, L. R. 1 Ex. 13; *Chase v. Maine Central Railroad*, 78 Maine, 346; *Heaney v. Long Island Railroad*, 112 N. Y. 122; *Greenwood v. Philadelphia, Wilmington, & Baltimore Railroad*, 124 Penn. St. 572.

The defendant's first request for a ruling was rightly refused. The allegation of negligence in the first count of the declaration was not so restricted as the request implied.

Exceptions sustained.

**WILLIAM W. DOWNS vs. BOWDOIN SQUARE BAPTIST
SOCIETY.**

Suffolk. January 17, 1889. — May 9, 1889.

Present: **MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.**

*Exceptions — Incorporated Proprietors of Meeting-house — Meetings —
Notice in Warrant — Settlement of Minister.*

A finding at a trial in accordance with an excepting party's contention will be taken to be correct as against him on his exceptions.

Proprietors of a meeting-house incorporated under the St. of 1840, c. 62, who own a meeting-house erected prior to the passage of the St. of 1845, c. 218, (Pub. Sts. c. 38, § 38,) have no power, unless in pursuance of the provisions of the Pub. Sts. c. 38, §§ 39-41, to settle a minister.

If such a corporation, by virtue of owning real or personal estate in addition to its meeting-house, may, under the Pub. Sts. c. 38, § 38, make a contract of settlement with a minister, action had at a meeting with reference thereto is inoperative, unless there is an article in the warrant relating to the subject; and an article "to transact any other business that may legally come before said meeting" is not sufficient.

In an action by a minister against such a corporation to recover for his services, it was held that the judge, who tried the case without a jury, was warranted in finding that the defendant did not employ the plaintiff, or make any contract with him, express or implied, for his services.

HOLMES, J. This is an action to recover for services alleged to have been rendered to the defendant by the plaintiff as its minister between April 1, 1885, and February 1, 1886. The case was tried without a jury. The court found for the defendant, and found specially that the plaintiff was not at any time employed by the defendant, under any contract, express or implied, and also that during the time covered by the declaration the plaintiff did not perform any service for the defendant, at its request or with its consent, express or implied. Many rulings were asked on both sides, but the only question now before us is whether we can say, as matter of law, that both the foregoing findings were wrong, in view of the uncontroverted evidence.

At the time when the plaintiff first began to preach in the defendant's meeting-house, there were some thirty members of the defendant's society, but all but seven had ceased to attend its business meetings, or to worship in the meeting-house, the

pews were all permitted to be used as free pews, and the church was conducted as a free church. The financial affairs of the church were managed upon a voluntary system, as the plaintiff knew, collections being taken up every Sunday morning, and envelopes being furnished in advance for that purpose to subscribers. These weekly payments were handed by the officers of the church to the treasurer of the defendant society. The salary of the plaintiff, and other expenses, were paid by the treasurer, under the direction of a joint committee of the church and society, out of a fund made up of these payments and the rentals of two stores in the meeting-house. The society raised no money by taxes, and had no income except these rentals.

In this state of things, on May 25, 1880, the church elected the plaintiff as its pastor, and communicated its vote to the joint committee. By the by-laws of the society, "every election of a minister for said society shall first be made by the members of the church, and their choice shall be submitted immediately to the society for its confirmation or rejection; and, in case of confirmation of such choice, the society shall proceed to fix the annual salary of the minister." See *Leicester v. Fitchburg*, 7 Allen, 90, 93. No vote of confirmation in express terms was ever passed. The joint committee's records of May 25, 1880, disclose the following: "Mr. Coleman presented a communication from the church, stating that they had extended a call to Mr. W. W. Downs to become their pastor, and desired the committee to appropriate a sum for the salary of the pastor elect. Voted, that the sum of twenty-five hundred dollars be appropriated for salary of the pastor elect, for one year from the commencement of his pastorate, with the usual vacation of four Sabbaths." The plaintiff was notified, and began his services at once. On April 11, 1881, nearly a year later, at a meeting which the court assumed to be a legal meeting of the society, but the call of which did not mention the confirmation of a minister as one of its objects, these members being present, it was voted, "that the acts of the joint standing committee for the past year be approved." There were other similar appropriations and approvals, down to June 1, 1884, equally without special previous notification. There was no vote of appropriations for the years beginning June 1, 1884, and June 1, 1885. A salary was paid, however,

to March 1, 1885, with the sanction of the joint committee. Before February 1, 1885, every remaining member of the society, and a considerable number of the members of the church, ceased to attend worship in the meeting-house, as the plaintiff knew. The remaining members of the church and the plaintiff took steps to raise more money by collection. The money collected was not paid over to the treasurer of the society after March 1, 1885, but was disbursed by the treasurer of the church, and, on the other hand, the treasurer of the society withheld the rentals. On May 4, 1885, at a meeting which the court assumed to be a meeting of the society, it was voted that until further action the church be authorized to occupy the real estate of the society not let for commercial purposes, and the net rentals, after paying certain expenses, be paid to the treasurer of the church, "the society not to be responsible for any expense whatever, except as above specified." This was assented to by the plaintiff, and the plan had been approved by him some time before. On October 28, 1885, at a meeting assumed to be a meeting of the society, a vote of the church was approved, requesting the plaintiff to resign. And at an adjournment of the same meeting, on November 19, 1885, it was voted that the plaintiff be dismissed "from the office of minister of the society, and from the employ of the society."

The defendant corporation was formed in 1841. It is found that it is a corporation of proprietors of a meeting-house, that is to say, that it was incorporated under the St. of 1840, c. 62, (Gen. Sts. c. 30, §§ 27-29; Pub. Sts. c. 38, §§ 27-41,) and of course has only the powers of such corporations. This finding was in accordance with the plaintiff's contention, and, although he now founds his whole argument upon a different ground, we should assume that it was correct as against him on his bill of exceptions, even if we saw reason to doubt it in fact. *Howard v. Hayward*, 10 Met. 408, 420. *Dennis v. Maxfield*, 10 Allen, 138. *Commonwealth v. Locke*, 114 Mass. 288. *Copp v. Williams*, 135 Mass. 401.

The powers of the defendant, under the St. of 1840, c. 62, were defined by reference to that part of the Rev. Sts. c. 20, which relates to proprietors of churches, meeting-houses, and other houses of public worship, that is, §§ 31-36. These sections

authorize the proprietors to raise money by taxing the pews in order to alter, enlarge, repair, rebuild, or remove their house, but not for the purpose of supporting a minister. Gen. Sts. c. 30, § 27 *et seq.*; Pub. Sts. c. 38, §§ 27-41. The proprietors referred to in the Revised Statutes are unincorporated proprietors, who first were given these powers of raising money for purposes of alteration, etc., by the St. of 1817, c. 189, somewhat analogous to the power of proprietors of lands held in common. Of course these proprietors had no power to raise money by taxing their members; and they had no power to raise it by taxing pews for any purpose, except those for which it was given them by statute. And when a corporation was given simply the powers which the proprietors formerly had, it could no more tax its members for the support of a minister than they could have done, and by the same reasoning it could not contract to employ him.

It is true that § 3 authorizes such corporations to hold real and personal estate in addition to their meeting-house, and provides that the annual income of all their real and personal estate shall be applied to parochial purposes, among which is the support of public worship. *Parker v. May*, 5 Cush. 336, 347. But even if this section, the latter part of which is primarily restrictive, would authorize payment of the income as it accrued in aid of the support of a minister, as was done by the defendant, it cannot be that the corporation would be authorized to contract for his employment, when, as we have shown, it had not the means given it to perform its contract, because it was not allowed to tax its members for that purpose, as parishes and religious societies were. Rev. Sts. c. 20, §§ 18, 30. The powers defined in § 1 of the act of 1840 are not enlarged by § 3. The matters in respect of which corporations formed under that act had power to contract, were not greater or less according to the accident of their having a greater or less income. Moreover, the defendant does not appear to have had an income sufficient to warrant the contract alleged to have been made.

Indeed, the plaintiff admits that corporations of this kind had no power to assess pews for the support of a minister until the St. of 1845, c. 213, (Gen. Sts. c. 30, § 39; Pub. Sts. c. 38, § 38,) gave the power to "any corporation for religious purposes, . . . in any meeting-house which they may hereafter erect." This

provision did not apply to the defendant, as its meeting-house had been erected before. Afterwards, corporations which had erected their meeting-houses before the act of 1845 were authorized to avail themselves of the provisions of that act on certain conditions. St. 1852, c. 319. St. 1854, c. 258. Gen. Sts. c. 30, §§ 40-42. Pub. Sts. c. 38, §§ 39-41. But the defendant never complied with these conditions. It follows, that, if the defendant attempted to make a contract with the plaintiff, it did not bind itself.

If the corporation had had power to make the alleged contract, it did not do so, because there was no article in the notification of any of the meetings indicating that the question of the confirmation of a minister, or any matter importing confirmation, was to be acted on. Whatever the nature of the corporation, it was plainly necessary that the objects of the proposed meeting should be stated. Pub. Sts. c. 38, §§ 12, 18, 25, 30, 32. Gen. Sts. c. 30, §§ 5, 13, 20, 30, 31. The fourth by-law of the corporation, relied on by the plaintiff, expressly required it, and it was peculiarly necessary in a case like the present, where the great majority of the members of the corporation were not in the habit of attending the meetings, did not attend the meetings in question, and presumably thought that they were incurring no risk by allowing the use and revenues of their meeting-house to be handed over to the church. If notice was necessary, a measure of such importance could not fairly be embraced in the phrase "to transact any other business that may legally come before said meeting." *People's Ins. Co. v. Westcott*, 14 Gray, 440, 442. *Gray v. Christian Society*, 137 Mass. 329. *American Tube Works v. Boston Machine Co.* 139 Mass. 5.

In *Leicester v. Fitchburg*, *ubi supra*, it appeared that there were valid votes of the society which recognized Mr. Lovell as the minister. In the case at bar there were no valid votes, because there was no article notifying the members that the subject was to be dealt with.

Finally, bearing in mind the general state of affairs at the time of the plaintiff's election by the church, as we have set it forth and as it was known to the plaintiff, the kind of corporation that this was found to be, in accordance with the plaintiff's request, and the whole course of dealing afterwards, we cannot

say that the court was not warranted in finding that the plaintiff and defendant, if they had any understanding together, did not understand that the defendant was contracting with the plaintiff, but only understood that the defendant had practically turned over its meeting-house to the church as licensees, and was content that the pastor whom the church elected should preach and take up collections there, and that the church should receive the rentals and the sums collected, applying them to the minister's salary up to the sum named for the year until the defendant should determine otherwise.

Undoubtedly there are indications in the defendant's records that its members did not always keep the difference between a religious society or parish and the incorporated proprietors of a meeting-house distinctly before their minds. But when the plaintiff was employed, the corporation had dropped into the subordinate and auxiliary position contemplated by the St. of 1840, c. 62, and illustrated by some of the cases in the books. *Silaby v. Barlow*, 16 Gray, 829. *Howard v. Hayward*, 10 Met. 408. *North Bridgewater Congregational Society v. Waring*, 24 Pick. 304, 308.

The plaintiff was elected by the church to be their pastor, and was so notified, and served for nearly a year before there was any pretence that the defendant had confirmed the choice. It might well have been found that the plaintiff looked to the church alone, and agreed with the church alone, whatever the legal infirmities of an agreement with such a voluntary organization might be.

Whether there was evidence that, if there ever had been a contract, it was rescinded before the time covered by the declaration, which the court seems to have found as an independent proposition, we need not consider.

Exceptions overruled.

B. F. Butler & E. M. Johnson, for the plaintiff.

H. W. Chaplin, for the defendant.

JOSEPH S. BRADLEY & another vs. RUFUS H. BRIGHAM.

Middlesex. January 22, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ

Former Judgment — Election between Remedies — Conversion — Waiver of Tort — Estoppel.

Assets of a partnership in a partner's possession at his death were sold for less than their value by his executor, who accounted for the proceeds as assets of the estate. The surviving partners, to recover their share of the proceeds, brought against the executor, as such, a bill in equity containing no averment that he had acted wrongfully or negligently in selling such assets, or sold them for less than their value, and, having recovered their proportion of such proceeds, brought an action against him personally for the conversion of such assets. *Held*, that the equity suit was founded on an affirmation of the sale, and was a bar to the action.

TORT by the plaintiffs, as surviving partners of the firm of Francis Brigham and Company, for the conversion of certain bonds as partnership property. The answer, among other things, set up a decree for the plaintiffs on a bill in equity brought by them against the defendant, as executor of the will of Francis Brigham, to recover the value of the same bonds.

At the trial in the Superior Court, before *Sherman, J.*, on the issue whether the equity suit was a full bar and defence to the action, the following facts were agreed or admitted.

The firm of Francis Brigham and Company consisted of Francis Brigham and the plaintiffs, and was dissolved in 1865. Francis Brigham died on December 7, 1880, at which time the partnership accounts had not been fully settled. The defendant was duly appointed executor of his will, and the bonds in question came into his hands with the other assets of the estate of Francis Brigham. The bonds were issued by the Mexican government, and were never listed at the brokers' board in New York or Boston, and in an inventory of the estate, duly taken and returned into the Probate Court by the defendant, were stated to be of "doubtful value." The bonds were sold by the defendant, on August 29, 1882, through a firm of brokers in Boston, at private sale, and without notice to the plaintiffs, for

\$2,475, or fifty per cent of their face and market value. No notice was given to the defendant by the plaintiffs that they claimed any ownership or interest in the bonds until October, 1883, when they made a demand on the defendant to deliver the bonds to them.

In October, 1883, the plaintiffs duly brought a bill in equity against the defendant, as such executor, to settle the partnership accounts, and to recover their share of the proceeds of the bonds and other partnership property. The bill contained the following allegations:

"First. That the plaintiffs and the said Francis Brigham, on or about the first day of October, A. D. 1850, entered into partnership under written articles of agreement. . . . In and by said articles it was agreed, among other things, that said partners should equally share the profits and equally bear the losses of their said partnership business.

"Second. Said partners carried on said business under said articles . . . until November 1, 1865, at which date said partnership was dissolved by mutual consent.

"Third. That there never has been any full settlement of said partnership business.

"Fourth. That soon after said dissolution, to wit, on or before the first day of January, 1866, all debts against said partnership were adjusted and paid, and all capital withdrawn, but there remained several unsettled claims due to said partnership, which it was agreed might be collected by either partner and the proceeds divided from time to time equally between said partners.

"Fifth. That on or about the first day of January, 1872, said Bradley received in part payment of one of said claims contracted prior to November 1, 1860, and due to said partnership, certain Mexican government bonds of the par value of \$4,950, but which at that date were of little value in the market, and by the mutual consent of all of said partners said bonds were placed, with other papers belonging to said partnership, in the safe and in the possession of said Francis Brigham for safe keeping till such time as said partners might agree to make a division of the same, and said bonds remained in the possession of said Francis Brigham till his death.

"Sixth. That on the seventh day of December, 1880, said Francis Brigham died, leaving a will, which was duly admitted to probate, and letters testamentary were issued to said Rufus H. Brigham, as executor of said will, and that as such executor said Rufus H. Brigham received and came into possession of the aforesaid articles, and also of said bonds, and that he has disposed of said bonds and received the proceeds thereof to the amount of six thousand dollars, and the plaintiffs are entitled to receive their share of said proceeds as stated herein, viz. one third to each, and interest thereon. And the plaintiffs have duly demanded of said executor that he pay to them their share of said proceeds aforesaid, but he refused and still refuses so to do.

"Seventh. That the plaintiffs have not come into possession of any partnership property except as aforesaid, but that the defendant and his said testator have received other property which said defendant ought to account for as a part of the assets of said partnership."

The prayer of the bill was as follows :

"First. That a receiver may be appointed to take possession of said partnership assets, and that an account may be taken of all and singular said partnership matters, and that the defendant be directed to pay to the plaintiffs whatever sums shall be found due to them in respect to said partnership matters, with interest thereon.

"Second. For such other and further relief as to your honors may seem meet."

The bill in equity was duly prosecuted, and a decree thereon was duly entered for the plaintiffs against the defendant, as such executor, for their share of the amount which he paid into the estate of Francis Brigham from the proceeds of the sale of the bonds, namely, \$1,995.26 including interest, as debt, and against the defendant personally in the sum of \$75.46, as costs. Executions issued thereon, and the same were paid and the judgments satisfied.

It was claimed on behalf of the defendant, that he acted in good faith, and believed when he sold the bonds that they belonged to the estate of his testator.

The jury, in reply to questions put to them as to the value of the bonds when demanded and when sold, stated that they were

then worth \$4,950. The judge directed them to return a verdict for the plaintiffs in the sum of \$1,650, being their share of the value of the bonds above the amount already paid them by the defendant, and reported the case for the determination of this court.

If the action could be maintained, judgment was to be rendered on the verdict; otherwise, judgment was to be entered for the defendant.

J. G. Abbott & J. T. Joslin, for the defendant.

S. W. Trowbridge, for the plaintiffs.

C. ALLEN, J. There is no doubt as to the general principles of law here involved; the only difficulty is in applying them to the peculiar facts of this case. If A.'s goods are wrongfully taken by B. and sold for a sum of money, A. has an election of remedies against B., and may sue him either for the conversion, or for the money had and received by him; but if he elects to sue him for the money had and received, the effect is to ratify the sale by B. as an act of agency, and A. cannot thereafter treat the taking of the goods as a wrongful act, but must accept the consequences of his affirmation of the sale. And so, in like manner, if A. does any act equivalent to suing for the money had and received, by which he treats the sale as valid and seeks to obtain the benefit of it as a valid sale, he cannot afterwards treat it as invalid for the purpose of obtaining a further advantage. *Le Breton v. Peirce*, 2 Allen, 8, 11. *Connihan v. Thompson*, 111 Mass. 270. *Smith v. Baker*, L. R. 8 C. P. 350. *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347. *Lythgoe v. Vernon*, 5 H. & N. 180. *Brewer v. Sparrow*, 7 B. & C. 310.

But if, on the other hand, A. in pursuing his rights does not show an intention to affirm the taking or the sale, but repudiates the same, and merely seeks as far as possible to follow and reclaim his goods or their proceeds, in whole or in part, from those into whose hands they may have come, this will not have the effect to waive the wrongful taking, or cut him off from his remedy for the original conversion, but he will only be bound to apply in reduction of damages whatever he may have received. For example, if B., having wrongfully taken A.'s goods, has delivered a portion thereof to each of several persons, or has sold the whole or a portion thereof, and subdivided the proceeds, and

paid a portion to each of several persons who had knowledge of the facts, A. may follow the goods or their proceeds and recover from each person who received any goods or money, without thereby waiving his remedy against B. for the original wrongful taking. Regaining one out of twenty stolen horses, or the value of one, will not bar an action for the conversion of the rest. *Smith v. Baker*, L. R. 8 C. P. 350. *Burn v. Morris*, 4 Tyrw. 485; *S. C.* 2 Cr. & M. 579. *Browning v. Bancroft*, 8 Met. 278. *Greenfield Bank v. Leavitt*, 17 Pick. 1. In determining whether the pursuit of one remedy bars another, it may become a question of the intention of the party.

The defendant contends that the plaintiffs are barred from maintaining the present action by their former proceedings in equity. *Bradley v. Brigham*, 144 Mass. 181. The plaintiffs there brought a bill in equity for a final settlement of the accounts of a partnership whereof the defendant's testator was a member. The bill alleged that the partnership was dissolved on November 1, 1865, that on or before the first of January, 1866, all debts were paid and all capital withdrawn, but that there remained several unsettled claims due to the partnership, which it was agreed might be collected by either partner and the proceeds divided from time to time equally between the partners; that on or about January 1, 1872, certain Mexican bonds were taken in part payment of one of said claims, and placed in the hands of the defendant's testator for safe keeping till such time as the partners might agree to make a division of the same, and remained in his possession until his death, which was in 1880; that the plaintiffs had not come into possession of any partnership property, but that the defendant's testator had received other property, which ought to be accounted for as assets of the partnership; that the defendant was executor, and as such executor came into possession of said bonds, and has disposed of the same, and received the proceeds thereof to the amount of \$6,000, and that the two plaintiffs were entitled to receive their share of said proceeds, namely, one third to each, and interest thereon, and had demanded of the executor that he pay to them their share of said proceeds. The prayer was for a receiver, and that an account might be taken of all and singular said partnership matters, and that the defendant be directed

to pay to the plaintiffs whatever sums should be found due, etc. There was no averment that the defendant as executor had acted wrongfully or negligently in making sale of the bonds, or that they were sold for less than their value. For all that appears in the bill, the plaintiffs might have assented to the sale by the defendant. There was no suggestion that the plaintiffs wished to repudiate the transaction, and to reserve a right of action against the defendant for his tortious act, but meanwhile would seek to follow the assets into his hands as executor. On the other hand, the plaintiffs averred that the sale was made by the defendant in his capacity as executor, and that he held the proceeds, that is, the whole proceeds, in that capacity, and that they were entitled to their share of those assets. They admitted that he as executor was entitled to retain one third of the proceeds, and they merely sought to recover their two thirds. The whole aspect of the bill was, that, if the plaintiffs could obtain a decree for the payment of two thirds of the proceeds of the bonds, they would thereby obtain all that they were entitled to in respect to the whole transaction of selling the bonds. Their bill was founded on an affirmation of the sale of the bonds. They pursued that case to a final decree, contending indeed, in the final argument, that the estate was responsible for the full value of the bonds, but with no suggestion upon the record that they had mistaken their remedy, or wished in any manner to change the character of their bill.

The election and pursuit of the remedy in the former proceedings are a bar to the present action, and according to the terms of the report the entry must be,

Judgment for the defendant.

SUSAN C. DAMON vs. CITY OF BOSTON.

Suffolk. January 25, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Personal Injuries — Defect in Sidewalk — Want of Fence.

A city in fencing the sides of a vacant lot between converging streets built the fence across the corner where they intersected, so as to exclude a triangular piece of the lot bounded by the fence and the sidewalk on each street. This piece was substantially on a level with the sidewalks, but depressed enough to retain water on it, which was frozen into smooth ice and became covered with snow. A woman travelling along the sidewalk of one street walked across this triangular piece towards the other, and fell upon the ice, receiving injuries. *Held*, that the city was not liable to her for such injuries.

TORT for personal injuries occasioned to the plaintiff by reason of the alleged want of a railing at the side of a highway in the defendant city. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, in substance as follows:

The plaintiff, on February 18, 1885, at about 11.30 o'clock in the forenoon, was walking on the sidewalk on the northerly side of Mount Vernon Street, along a lot of land belonging to the Church of the Advent, toward Brimmer Street. The part of this lot which lay at the intersection of the two streets was rough ground not built upon, and was enclosed on both Mount Vernon Street and Brimmer Street by a wooden fence about four feet high, erected by the defendant city. The fence ran along the inner edge of the sidewalk on each street, except at the extreme corner, where the sidewalks make an angle of about forty-five degrees. The fence ran westerly on Mount Vernon Street to a point about four feet from the inner line of the Brimmer Street sidewalk, where the grade of the lot substantially coincided with that of the sidewalk, and then ran across the corner of the vacant lot to a point in the Brimmer Street sidewalk about four feet from the Mount Vernon Street sidewalk, and then along Brimmer Street. A plan of the locality, made a part of the

agreed statement, showed that on Mount Vernon Street the lot was level with the sidewalk, and that on Brimmer Street the lot was one half-inch below the level of the sidewalk. The extreme corner of the vacant lot was thus left unfenced, forming a small triangle, bounded by the edges of the sidewalk on the two streets and by the fence. The plaintiff, if competent, would prove that after the accident the city changed the fence so as to enclose the entire lot. The sidewalk on each street was built by the defendant city of brick, being a part of the public highway, and was bounded on the inner edge, along the above-described triangle, by a row of bricks set edgewise. Within this triangle the ground sloped down slightly, with an uneven and lumpy surface, from the fence toward the sidewalk, and a pool of water immediately contiguous to the sidewalks had been collected in the triangle between the rows of bricks above mentioned and the fence, as the bricks prevented the water from running off, which pool had been frozen into smooth ice. A small amount of snow had fallen in the night of February 16, 1885, and had not been cleared away from the sidewalks bounding the vacant lot, or from the triangle, and covered these at the corner of the streets so as to make them appear one even surface, and so as to give no indication that the fence did not run along the edge of the paved sidewalks at this corner, and mark its division from the vacant lot, as it did in the remainder of its course.

The city had reasonable notice of the position and construction of the fence and sidewalk, of the condition of the triangle, and of all the other facts above described, and had such notice for sufficient time to have changed the position of the fence. The defendant was duly notified of the time, place, and cause of the injury. The plaintiff was walking at a moderate pace, and was otherwise in the exercise of due care. Upon arriving at the corner above mentioned, she continued to walk near the line of the fence, there being nothing to show her that the sidewalk did not extend up to the fence at this point as elsewhere, and so stepped into the triangle above described. She there slipped and fell, without negligence on her part, on the pool of ice covered with snow as above described, and broke her right arm and received other injuries.

If upon the above facts the plaintiff could recover, judgment

was to be entered for her in the sum of five hundred dollars, with costs; otherwise, judgment was to be entered for the defendant, with costs.

J. T. Wheelwright & W. K. Richardson, for the plaintiff.

1. There was a want of sufficient railing. Where a dangerous place or object exists in such close proximity to the highway that there is risk of a traveller thereon, using due care, being injured by that defect, then a railing is requisite to make the way itself safe and convenient; and the cases apply equally to travellers on foot and in carriages. *Stickney v. Salem*, 3 Allen, 374, 376 (Bigelow, C. J.). *Alger v. Lowell*, 3 Allen, 402. *Coggswell v. Lexington*, 4 Cush. 307. *Hayden v. Attleborough*, 7 Gray, 338. *Purple v. Greenfield*, 138 Mass. 1. In this class of cases the usual question of fact is whether the defect is near enough to the highway to render a railing necessary. But this question cannot arise in the case at bar. *Jewhurst v. Syracuse*, 108 N. Y. 303, is indistinguishable in its facts from the present case. This court, in deciding the numerous cases as to the statutory liability of towns, has been guided largely by the equity of each case, and has considered both what the safety of travellers requires and what it is reasonable to require of a town. "The case supposed is not one of city travel. The law, as to the extent of repair, and what will constitute obstructions rendering a public way unsafe and inconvenient for the traveller, must depend in a good degree upon the locality of the road." *Bacon v. Boston*, 3 Cush. 174. *Burnham v. Boston*, 10 Allen, 290, 293. So in the case of *Marshall v. Ipswich*, 110 Mass. 522, where a traveller strayed from a country road to some bricks beside the highway, it appeared that there was no sidewalk, nor was there travel enough to require it, which distinguishes that case from the case at bar.

2. The city, by the manner in which it built its fence, had practically invited travellers upon this sidewalk to walk across this triangle; and by the way in which it had built its sidewalk had created a dangerous defect within this triangle. It is plain that in such a case the reasons for holding the defendant city liable are much stronger than in those where there is no railing at all. The defendant city assumed to control the triangle by building a fence across it, thus cutting it off from the remainder

of the lot, and also by subsequently removing the fence from that position; and having thus assumed control over the triangle, and included it in the highway by a railing, it is liable for any injury caused by a defect therein as much as if the defect had been in the legal highway. "The rule is well settled that the act of the city in assuming authority to control the land as a street renders it chargeable with the same duties, and imposes upon it the same liabilities, as if it had been lawfully laid out, and it is estopped from questioning that it was a lawful road." *Sewell v. Cohoes*, 75 N. Y. 45. *Aurora v. Colshire*, 55 Ind. 484. *Mayor v. Sheffield*, 4 Wall. 189. *Coates v. Canaan*, 51 Vt. 131. 2 Dillon Mun. Corp. (3d ed.) § 1009. See *Williams v. Cummington*, 18 Pick. 312. This well settled rule works no hardship to the city in this case. The city deliberately built its boundary fence across this corner, and it should be held to a duty to keep that corner free from defects. The city had so built its sidewalk as to collect a pool of water which froze into smooth ice. This is a "defect" for which the city is liable within the meaning of the statute. *Adams v. Chicopee*, 147 Mass. 440, and cases cited.

3. The defendant is liable to the plaintiff at common law, even if it be assumed that it is under no statutory liability for a "want of sufficient railing" at the place of the accident. It erected the railing and built the sidewalk so negligently and improperly that the plaintiff was led into a place of danger, and was thereby injured. For this tort it is liable. *Hawks v. Charlemont*, 107 Mass. 414. *Deane v. Randolph*, 132 Mass. 475. *Sullivan v. Holyoke*, 135 Mass. 273. *Waldron v. Haverhill*, 143 Mass. 582. "In all of these cases, the city or town was acting, not merely in the discharge of a public service, but also with reference to penalties and liabilities imposed upon it by law for imperfect work. The pecuniary motive came in. It was acting in furtherance of its own pecuniary interest, as well as for the benefit of the public." *Tindley v. Salem*, 137 Mass. 171, 173. "The fact that the plaintiff was induced by the defendant to enter upon a dangerous place without warning, is the negligence which entitles the plaintiff to recover." *Davis v. Jamaica Plain Congregational Society*, 129 Mass. 367, 371. See *Commonwealth v. Wilmington*, 105 Mass. 599; *Larue v. Farren Hotel Co.* 116

Mass. 67; *Learoyd v. Godfrey*, 138 Mass. 315; *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 375.

T. M. Babson, for the defendant.

C. ALLEN, J. The want of a railing was the only alleged defect in the way. The plaintiff received her injury by walking off from the sidewalk upon the adjoining land, which was substantially on a level with the sidewalk, and there slipping upon smooth ice which was covered with snow. The only question is whether the city was bound to put up a railing or fence to guard travellers against peril of this nature, and we are of opinion that it was not. The danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets, and sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them, unless their condition is such as to expose travellers to unusual hazard. *Sparhawk v. Salem*, 1 Allen, 30, 32. *Adams v. Natick*, 13 Allen, 429, 431. *Marshall v. Ipswich*, 110 Mass. 522. The fact is immaterial that there was nothing to mark the line of the highway. *Stockwell v. Fitchburg*, 110 Mass. 305. *Stone v. Attleborough*, 140 Mass. 328. The present case falls within these decisions. The danger was not of such a character that the city was bound to fence against it. It would impose an unreasonable burden upon cities and towns to hold them liable for accidents occurring merely from slipping upon ice upon level ground outside of the limit of the highways.

The plaintiff also contends that the defendant is liable at common law; but in this Commonwealth no common law liability rests upon cities and towns in a case like this.

In the opinion of a majority of the court, the entry must be,
Judgment affirmed.

HANNAH CUNNIFF vs. ISAAC W. PARKER.

Middlesex. January 29, 30, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Bill to redeem — Fraudulent Conveyance — Issues to Jury — Sale on Execution — Writ of Entry.

Under the Pub. Sts. c. 172, § 49, a purchaser at the sale on execution of a judgment debtor's land, the record title to which fraudulently stands in another's name, must not only bring an action for possession against the fraudulent grantee within a year after the return day of the execution, but must prosecute it with effect; otherwise the levy is void.

A bill in equity to redeem land from a mortgage was brought by a married woman against an assignee of the mortgage, pending a writ of entry to recover possession of the land brought by him, under the Pub. Sta. c. 172, § 49, as the purchaser at an execution sale of the equity of redemption against her as the fraudulent grantee of her husband, the judgment debtor, which writ, pending the bill and issues to a jury on the question of fraud, was entered "neither party." *Hdd.*, that the assignee's rights under the sale were at an end, the only remaining right he had being under the mortgage, which she might redeem whether the conveyance to her was in fraud of creditors or not, and that the issues had ceased to be material.

BILL IN EQUITY to redeem land in Natick from a mortgage, alleging that the land in question was purchased by the plaintiff's husband, Martin Cuniff, largely with her money, and was conveyed to the plaintiff by him on April 15, 1887, through a third person, subject to the mortgage; that on July 15, 1886, Martin gave his promissory note to the defendant, who duly recovered judgment on the note, and an execution issued thereon; that the equity of redemption in the land was sold on the execution as belonging to Martin, but standing in the name of the plaintiff, and was purchased by the defendant; that the defendant brought a writ of entry, dated December 18, 1886, to recover possession of the land, which writ was still pending; that the note from Martin to the defendant was without consideration, and was given, and the action brought upon it, to enable the defendant to bring the writ of entry; and that the defendant, who had procured the mortgage to be assigned to him, had advertised the land to be sold under a power contained in the mortgage for breach of condition; and prayed for an account,

and that the defendant, upon payment to him of what was due, might be ordered to assign the mortgage to the plaintiff, and for further relief.

The answer denied that the land was purchased with the plaintiff's money, and alleged, among other things, "if plaintiff has taken any conveyance of said premises to herself, that such conveyance was fraudulently made by her husband, Martin Cun-
niff, with intent to defeat, delay, hinder, and defraud the said Martin's creditors; and the plaintiff well knew at the time of the making of said conveyance its said fraudulent purpose."

The case was ordered to be tried in the Superior Court, upon issues to a jury upon the questions thus raised. At the trial, before *Brigham*, C. J., the jury answered the issues in favor of the plaintiff; and the defendant alleged exceptions, which are not material.

L. H. Wakefield, (*H. G. Sleeper* with him,) for the defendant.

G. D. Tower, (*H. C. Mulligan* with him,) for the plaintiff.

HOLMES, J. If the issues framed were ever material, they have ceased to be so. It was stated, and admitted at the bar, that the defendant's writ of entry, as purchaser at the execution sale, against the plaintiff, as fraudulent grantee of the judgment debtor, has been entered "neither party." This being so, the defendant's right under the sale is at an end, because the levy is void by the terms of the Pub. Sts. c. 172, § 49. That section means, of course, not only that the purchaser must begin his suit within a year, but that he must prosecute it with effect. The only right the defendant now has is under the mortgage which he has purchased, and the plaintiff has the right to redeem it, whether her husband's conveyance to her was in fraud of his creditors or not.

Issues discharged.

LUCIUS R. EASTMAN, JR. & another vs. JOHN W. ALLARD
& others.

Middlesex. February 1, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.

Town — Bequest in Trust to Public Library — Printing of Catalogue.

A free public library situated in the centre village of a town received by will the income of a trust fund, one third to be expended in buying books for the library, and the other two thirds "in purchasing books for the use of said library, or works of art suitable to adorn the hall or library-room in said centre village, wherein said library may hereafter be kept and maintained, or in defraying the expense of taking care of the same," subject to the condition that no part of the income should ever be expended "for the support of any library or library building, or for the purchase of books or works of art for the use of any library except such as shall be located in said centre village." *Held*, that, besides the purchase of books and works of art, and the care of the library-room, the income was to be devoted to the care and support of the library, which would include the printing of a catalogue necessary to the beneficial use of the library.

BILL IN EQUITY, by a minority of the trustees of the Framingham Town Library, originally brought against the majority of such trustees to restrain them from using a portion of the net income of a trust fund in printing a catalogue of the library. The bill was amended by making the Attorney General and the inhabitants of the town of Framingham parties defendant. Hearing upon the pleadings, before *W. Allen, J.*, who reserved the case for the consideration of the full court, in substance as follows.

A free public library, duly established by a vote of the inhabitants of the town in 1855, is situated in the centre village of Framingham, and is under the care and supervision of a board of twelve trustees, duly chosen in accordance with the by-laws of the town, of which the plaintiffs and the original defendants are the members. Moses Edgell, by his will, which was duly admitted to probate in March, 1875, provided as follows:

"Item Tenth. All the rest, residue, and remainder of my property of every kind, real, personal, and mixed, remaining at

the decease of my said wife and not disposed of by this will, I hereby give, bequeath, and devise unto the inhabitants of the town of Framingham and their successors forever, they to have and to hold the same in trust for the purpose hereafter named, but upon the conditions and subject to the restrictions herein named, as a fund to be known as and called the Edgell Library Fund. Said fund shall remain in the hands of the treasurer of said town, or such other person or persons as said inhabitants may elect for that purpose, he or they giving bonds as directed in item seventh; and said fund shall be invested in the same manner as directed in item seventh respecting said cemetery fund, and the income thereof shall be expended as follows, to wit: first, not less than one third of the net income of said fund shall be expended annually by the trustees of the free public library now located in the centre village of said Framingham in purchasing books for the same; the remaining two thirds of the net income of said fund shall be expended by said trustees in purchasing books for the use of said library, or works of art suitable to adorn the hall or library-room in said centre village, wherein said library may hereafter be kept and maintained, or in defraying the expense of taking care of the same. The foregoing bequest is made upon and subject to the following express conditions, to wit: first, no part of the income of said fund shall ever be expended for the support of any library or library building, or for the purchase of books or works of art for the use of any library except such as shall be located in said centre village; second, no part of the principal of said fund shall ever be expended, and in case any part of said principal should be lost, then no part of the income thereof shall thereafter be expended until said fund by accumulation or otherwise shall have been restored to its original amount; and the treasurer of said town, or such person or persons as may have the charge of said cemetery and library funds, shall annually, at some legal meeting of the inhabitants of said town, submit for their consideration a written report of the condition of said funds, the amount of the same, how invested, the amount of income derived therefrom, and to whom the same may have been paid, and they shall also pay over semiannually to the trustees of said cemetery the net income of said cemetery fund, and to the trustees of said

library the net income of said library fund, excepting as herein mentioned in case of loss, and the trustees of said cemetery and said library shall in like manner report the amounts received by them respectively from the income of said funds, and the purposes for which the same may have been expended."

On January 17, 1876, the inhabitants of the town duly accepted the gift, and after the decease of the wife of the donor the executor of the will paid over to the town \$47,000, the amount thereof, the net income of which the trustees received regularly for the purposes of the trust. The printing and publication of a catalogue of all the books in the library became necessary, and the trustees of the library, at a regular meeting duly held on June 14, 1886, voted to print and publish such a catalogue, and to pay the expense thereof out of the net income of the Edgell Fund, ten trustees, being the original defendants, voting in the affirmative, and two trustees, being the plaintiffs, voting in the negative, and filing a protest in writing thereto.

The majority of the trustees contended that they were warranted, under the terms of the bequest and by the authority vested in them by the town by-laws, in printing and publishing a catalogue of the library, and paying therefor out of the income of the trust fund. The minority contended that such an expenditure of the income was not within the testator's intention, but was contrary to the terms of the bequest and to the conditions and restrictions contained in it, and would imperil the possession of the fund by the town.

The case was submitted on briefs to all the judges.

W. Adams, for the plaintiffs.

H. C. Bliss, First Assistant Attorney General, for the Attorney General.

J. W. Allard, for the defendant trustees and the town.

W. ALLEN, J. The testator did not intend to found a library, but to benefit an existing public library. The whole income of the fund was to be expended by the trustees of the free public library already located in the centre village of Framingham; one third of the income was to be expended in purchasing books for the library, and two thirds "in purchasing books for the use of said library, or works of art suitable to adorn the hall or library-room in said centre village, wherein said library may

hereafter be kept and maintained, or in defraying the expense of taking care of the same." The natural and reasonable construction is, that at least one third should be expended in the purchase of books, the remaining two thirds might be expended in the purchase of books or in the purchase of works of art, or in taking care of the library, including the books, works of art, and library-room which belonged to and would come under the general designation of library. The condition which follows, that no part of the income shall ever be expended "for the support of any library or library building, or for the purchase of books or works of art for the use of any library, except such as shall be located in said centre village," shows that the testator intended that the two thirds might be expended for the support of a public library in the centre village, and in some other manner than in the support of a library building or in the purchase of books or works of art.

The entire income was devoted to the purchase of books and works of art, and the support of a library-room, and the support and care of the library. The care and support of the library includes the furnishing of catalogues necessary to its beneficial use. A printed catalogue is so obviously essential to the use of the library which the testator contemplated, that the authority to use for printing a catalogue income given for the care and support of the library would hardly have been questioned had the library been established and wholly endowed by the will. The fact that the bequest is for a public library for which the town has authority to appropriate money cannot affect the construction of the will in this respect. Besides, the authority of the town is to "establish and maintain" a library (Pub. Sts. c. 40, § 9, c. 27, § 10), and if the trustees have not authority under the will to print a catalogue, it is difficult to see how the town can have such authority under the statute.

A majority of the court is of opinion that the proposed expenditure is within the authority of the trustees.

Bill dismissed.

INTERNATIONAL TRUST COMPANY vs. ALONZO W.
BOARDMAN.

Suffolk. February 1, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Attachment — Insurable Interest of Judgment Creditor — Insolvent Debtor —
Powers of Assignee — Ultra Vires — Severable Contract.*

A judgment creditor, with the security of an attachment followed by the levy of execution begun but not completed, may obtain insurance against fire upon the property attached, and after a loss collect and apply the insurance money to his own use, without accounting with his debtor.

An assignee in insolvency in good faith made an agreement with an attaching creditor, in consideration of a release by him of a lien of an attachment and of a levy on execution, to pay the debt out of the proceeds of a sale of the property attached and of other unattached property of the insolvent debtor; and after the sale and the payment of the price to him, but before he paid the debt, he resigned, and a new assignee was appointed. *Held*, that the agreement was valid and enforceable, and that the new assignee was substituted to the liability of the original assignee.

BILL IN EQUITY, filed on January 9, 1888, against Alonzo W. Boardman, the assignee in insolvency of the Goulding Mills, to enforce the payment of a claim of the plaintiff against that corporation, under an agreement made by Mr. Boardman with the plaintiff. The bill was amended by making George F. Kendall, the successor of Mr. Boardman as such assignee, a party defendant. Hearing before *Field, J.*, who reported the case for the consideration of the full court, in substance as follows.

The following facts were agreed. On December 17, 1886, and on January 11, 1887, the plaintiff brought successive actions against the Goulding Mills, a corporation duly established and having its usual place of business in Malden, and attached its real estate, other creditors of it meanwhile, on January 5, making like attachments of the same real estate. On April 15, 1887, the plaintiff having recovered judgment against the corporation in its second action of January 11, 1887, and an execution duly issuing thereon, levied on its real estate on March 24, 1887, which levy was suspended. The corporation filed a petition in insolvency on May 14, 1887, the first publication of

notice of the issue of a warrant thereon being made on May 16, 1887, and on June 4, 1887, Mr. Boardman was duly appointed assignee, and accepted the trust. On June 4, 1887, the plaintiff obtained insurance against fire on its interest in the real estate attached by it to the amount of \$8,000, paying premiums to the amount of \$167.48 therefor, in four policies, each of which contained the following: "In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, . . . or replace the property with other of the same kind and goodness,—or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company." The policies contained no other provision relating to the substitution or subrogation of the insurer to the rights of the insured.

On July 6, 1887, the real estate and certain personal property, machinery, fixtures, etc. of the insolvent corporation were damaged by fire; and subsequently the plaintiff collected and received under its policies on account of such damage the sum of \$3,111.38 over and above the premiums paid by it on such policies.

The plaintiff, by its president, John E. Graham, and Mr. Boardman and one of the other attaching creditors of the insolvent corporation, on August 9, 1887, executed an agreement, which was the agreement in question, as follows:

"Whereas A. W. Boardman has been duly appointed assignee of the Goulding Mills of Malden, we hereby assent to his sale of said mills, including the land on which they stand, the buildings, and all the machinery, engines, boilers, etc., and all fixtures, heating and lighting apparatus, etc., to be sold at public

auction; said Boardman hereby agreeing to pay us the several claims now in suit by us against said mills from the proceeds of such sale, after first paying therefrom the tax of the city of Malden; such claims to be paid in the order of their attachment."

Mr. Boardman, on August 25, 1887, sold the real estate and certain personal property of the corporation not under attachment for \$8,600, and received from the purchaser a portion of the price on that date, and the balance on September 15, 1887. On October 3, 1887, the plaintiff's first action of December 17, 1886, then pending, was settled by the payment by Mr. Boardman of \$4,059.12 to the plaintiff, and afterwards Mr. Boardman paid the tax to the city of Malden mentioned in the above agreement and the claims of the other attaching creditors of the corporation, leaving a balance of \$3,970.72 in his hands, but did not pay the amount due on the execution issued in the plaintiff's action of January 11, 1887, which, including costs, amounted to \$3,868.08, that being the amount of the claim in question. Shortly before February 9, 1888, Mr. Boardman resigned as such assignee, and his resignation was accepted, and George F. Kendall subsequently was duly appointed assignee of the corporation, and all its estate was duly assigned to him. No inventory was taken of the property of said insolvent debtor; and it is impossible to determine what proportion of the \$8600 received by Mr. Boardman from the sale by him was derived from the sale of the property attached and levied upon by the plaintiff, and what proportion was derived from personal property upon which the plaintiff had no attachment or levy.

The judge also found, in addition to the facts agreed, that the property sold by the assignee on August 25, 1887, was the same property as that described in the agreement in question; that it was not the understanding of both Graham and Mr. Boardman that the amount received by the plaintiff from the insurance policies should be deducted from the claim in suit; that Graham never intended that Mr. Boardman should so understand the agreement; that this matter was not carefully discussed and agreed by the parties, and that, while from some things that were said Mr. Boardman got this understanding, Graham did not have it, and that Graham did not intend to deceive Mr.

Boardman in this respect; and that, upon the making and execution of the agreement, the plaintiff discharged its attachment and levy, in order to enable Mr. Boardman as assignee to convey the property described in the agreement free and discharged of the attachment and levy.

The judge made a decree, that the balance in the assignee's hands should be paid to the plaintiff on account of its claim, which at the date of the decree exceeded, with interest, the amount of such balance.

L. L. Scaife, (*B. G. Davis* with him,) for Kendall.

R. M. Morse, Jr., for the plaintiff.

C. ALLEN, J. There are two questions in this case: first, whether the plaintiff must apply the insurance money upon its claim; and secondly, whether the plaintiff is entitled to enforce the agreement of the assignee.

1. It has often been declared by this court, that where a mortgagee, at his own expense and without any agreement or understanding with the mortgagor, obtains insurance upon his interest as mortgagee, and collects the money from the insurer after a loss, he is not bound to account for it to the mortgagor, nor is the insurer entitled to be subrogated to the mortgagee's claim against the mortgagor. The insurance is a wholly collateral contract, which the law allows the mortgagee to make.

White v. Brown, 2 Cush. 412. *King v. State Ins. Co.* 7 Cush. 1, 4. *Foster v. Equitable Ins. Co.* 2 Gray, 216. *Loomis v. Eagle Ins. Co.* 6 Gray, 396, 401. *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123. *Clark v. Wilson*, 103 Mass. 219, 221. *Haley v. Manufacturers' Ins. Co.* 120 Mass. 292, 296. *Washington Mills v. Weymouth Ins. Co.* 135 Mass. 503, 506. The defendant assumes that the insurer is not entitled to subrogation, and asks us to reconsider and overrule the doctrine that the mortgagee is not bound to account for the insurance money to the mortgagor; but we remain satisfied with the rule, and the reasons given for it in the cases above cited.

The defendant then seeks to distinguish this case from the case of a mortgagee; but we see no valid distinction. A mortgagee is a creditor with the security of a mortgage. The plaintiff was a judgment creditor with the security of an attachment followed by a levy of the execution begun but not completed.

As such creditor, the plaintiff obtained the insurance, and after a loss by fire collected the insurance money. The debtor was in no way privy to this transaction, and could not have been made chargeable with the premium, and stood no better than a mortgagor.

2. The present defendant, the new assignee, contends that the agreement of Mr. Boardman was unlawful, as promising to give to the plaintiff the benefit of property not attached. The consideration of the agreement was sufficient, it being the release by the plaintiff of its lien upon the real estate. The agreement did not have for its object the withdrawal of property from the general creditors, but the saving of property for them. It is conceded that the motives of Mr. Boardman were good. The agreement therefore was not unlawful because of any improper motive; but if unlawful, it was so because it was *ultra vires*. This argument, if carried out, must go to the length that an assignee has not the power to put at risk any property, however small, for the purpose of securing any advantage, however great. But this proposition could not be maintained in its full length and breadth; an assignee must be at liberty, within reasonable limits, to expend money for the purpose of benefiting the estate. The statutes require this, by allowing him to prosecute doubtful claims, to avoid preferences and fraudulent conveyances, and to accept and hold under leases. Pub. Sts. c. 157, §§ 26, 46, 51, 96, 98.

It must necessarily be within the power of an assignee to enter into some contracts for the benefit of the estate, although they may involve disbursements. *Abbott v. Stearns*, 139 Mass. 168. But, moreover, the statutes expressly provide that "the assignee may redeem all mortgages, conditional contracts, pledges, and liens of or upon any goods or estate of the debtor, or sell the same subject to such mortgage or other incumbrance." Pub. Sts. c. 157, § 46. The plaintiff's attachment and levy constituted a lien, and the statute is broad enough to have authorized the assignee to pay off the lien, or to sell the property subject to it. Of course judgment and discretion must be used, but we have no concern here with the question what his liability might be, upon the settlement of his accounts, in case of negligence or otherwise. Since the assignee had power to

pay off the lien before making sale of the property, he had power to promise to pay it off after making such sale, and that includes the power to make such promise, not absolutely, but limited by the amount that certain specified property should bring when sold. We cannot, therefore, say that the contract was invalid because *ultra vires*.

There is another view of the case which leads to the same result. Let it be assumed that the assignee had not the power to promise to apply the proceeds of the unattached property to the payment of the plaintiff's claim; yet that part of the contract is severable from the rest. The assignee was not under the agreement bound to sell the whole property, both that which was attached and that which was unattached, for one integral sum, without discriminating how much of the price was for attached property and how much for unattached. Under this state of things, the consideration being lawful, and the lawful part of his promise being severable from that which was unlawful, he might be held upon so much of his promise as was lawful. *Rand v. Mather*, 11 Cush. 1, 7. *Bishop v. Palmer*, 146 Mass. 469, 475, and cases there cited. *Gelpcke v. Dubuque*, 1 Wall. 221. *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235. *Pickering v. Ilfracombe Railway*, L. R. 3 C. P. 235, 250. It was therefore his duty to keep the proceeds separate. He could not by mixing them up enable himself or his successor in office to say that his agreement was unlawful in part, and that therefore there should be no liability whatever upon it. The duty rested upon him to keep that fund for which he was accountable separate from that for which he was not accountable; and if by reason of his failing to do so he was unable to show how much of the proceeds of the sale he was entitled to keep, he must account for the whole. *Lupton v. White*, 15 Ves. 432. *Cook v. Addison*, L. R. 7 Eq. 466, 470. *Lewin on Trusts*, (8th ed.) 273. The new assignee, who makes this defence, stands in the place of the original assignee, and is substituted to his rights and liabilities in this respect.

Decree affirmed.

LILLIE B. TITUS vs. CITY OF BOSTON.

Suffolk. March 5, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*City — Sewerage System — Eminent Domain — Removal of Soil —
Conversion — Statutory Remedy.*

A city, authorized to take land in different counties for the construction of a sewerage system under a statute giving a remedy to the landowners, may remove from one county to the other soil excavated in constructing one part of the system and there use it in constructing another part; and such an owner, who has settled with the city and released it from all liability for the taking of his land, cannot maintain an action against it for the conversion of such soil.

TORT for the conversion of loam and gravel alleged to be the property of the plaintiff, and to have been taken by the defendant from Moon Island in Boston Harbor to the Calf Pasture in Dorchester, in constructing its system of improved sewerage. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, the material part of which appears in the opinion.

A. Russ, (F. L. Washburn with him,) for the plaintiff.

A. J. Bailey, for the defendant.

MORTON, C. J. The St. of 1876, c. 136, § 1, authorizes the city of Boston, for the purpose of laying and maintaining a main sewer running southeasterly from the direction of Charles River, to build and maintain wharves, pumping works, and reservoirs for said sewer on the mainland at or near the mouth of the Neponset River, thence to conduct said sewer by means of a siphon or tunnel under the bottom of the harbor to that part of Quincy called Squantum, thence along or across said Squantum and the flats adjacent thereto to Moon Island, and to build and maintain on Moon Island reservoirs and other works essential to a proper and convenient discharge of the contents of said sewer. By § 2, the city is authorized to take such lands, buildings, wharves, and structures as may be necessary to accomplish the objects of the preceding section; and all damages to private property, or for lands, buildings, wharves,

or structures taken under this act shall be ascertained as provided in chapter 43 of the General Statutes, which was the statute then in force as to the laying out and discontinuing of highways and town ways.

The statute of 1876 contemplates an extensive system of sewerage, a part of which is in the county of Suffolk and a part in the county of Norfolk. Acting under the statute, the city took many pieces of land, among which were a piece of land a part of the "Calf Pasture," so called, in Boston in Suffolk, and Moon Island in Norfolk, and proceeded to construct upon Moon Island an extensive system of reservoirs and other works, for the purpose of carrying out the system of sewerage authorized by the statute. Moon Island is an island in the harbor of Boston, containing about thirty-five acres, and it is not agreed, nor does it appear, that it was an unreasonable exercise of the power conferred by the statute to take the whole of it for the purpose of the sewerage system. In constructing the system the city took the loam and gravel excavated in making the reservoirs, and also some gravel from the other part of the island, which it carried by scows to the Calf Pasture, and used for an embankment in which a part of the main sewer is laid and constructed. The plaintiff contends that the city had no right to do this, and has brought this action to recover the value of the loam and gravel so removed.

We are of opinion that the action cannot be maintained. It is true, as claimed by the plaintiff, that the city did not acquire the fee of the land. *Tucker v. Tower*, 9 Pick. 109. But they did take the right to dig up the surface and to appropriate the soil and gravel so far as was reasonably necessary to carry out the plan and construct the work contemplated in the statute. It is closely analogous to the right which a town or a highway surveyor has to use the gravel and material on one part of the public way for the construction or repair of another part of the general system of highways. It has from the earliest times been the practical construction of our laws authorizing land to be taken for public use, that the towns or corporations had the right, as one of the incidents of the taking, to use the gravel or soil of one part of a way for the construction of another part, and that the owner's remedy is by an application for damages

under the statute, and no adjudication is found which conflicts with this construction.

In *Adams v. Emerson*, 6 Pick. 57, the court, in deciding that a turnpike corporation could not take the herbage growing on the side of the road-bed, is careful to say that the corporation in order to construct or keep in repair its road "may dig up and remove from place to place, within the limits laid out for the road, any earth, sand, and gravel, and may dig or cut up sods and turf." This right is also recognized in *Robbins v. Borman*, 1 Pick. 122, and in *Proprietors of Locks and Canals v. Nashua & Lowell Railroad*, 104 Mass. 1, 11.

In *Denniston v. Clark*, 125 Mass. 216, it was directly decided that a surveyor of highways has the right to take earth, gravel, and stones from one part of the way and deposit them on another part of the same way, and it is strongly implied that he may so remove materials to any part of the system of highways in his town, all being regarded as parts of one plan of public improvement for the accommodation of the public travel.

The same principle applies in the case at bar. The Legislature authorized the city to make a great public improvement, and to take lands necessary for that purpose. By the taking, and as an incident of it, the city acquired the right to use the soil and gravel on one part for the purpose of constructing the other parts of the improvement, and it can make no difference that the soil and gravel were carried across the county line to be used on the part of the system in another county. The remedy of those who owned the land at the time of the taking was by an application for an assessment of their damages under the statute. They could not maintain an action at law. In fact they have settled with the city, and have discharged it from all liability for the taking of the land. The plaintiff has, since the settlement, acquired the title of such owners in Moon Island. But by this settlement such owners received compensation for the right which the city had to remove and use the soil and gravel. The subsequent purchase by the plaintiff cannot defeat or divert this right of the city, and it is therefore clear that the plaintiff has no right of action against the city.

Judgment for defendant affirmed.

LEWIS L. P. ATWOOD & another vs. EMMIE L. DUMAS.

Suffolk. March 6, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Trustee Process — Shares in Co-operative Bank — Notice.

A co-operative bank is chargeable in a trustee process as the trustee of a member at the withdrawal value of his shares, although he has given it no notice of his desire to withdraw such shares.

TRUSTEE PROCESS. The West Roxbury Co-operative Bank, summoned as trustee, in answer to interrogatories filed by the plaintiffs, answered as follows:

“And now comes Benjamin H. Jones, secretary of said West Roxbury Co-operative Bank, and answers as follows:

“1. The trustee is a corporation organized and doing business under chapter 117 of the Public Statutes, and the acts and amendments in addition thereto, and under its by-laws duly established; and the defendant is not a depositor in such corporation, but is a holder of nine shares in the twelfth series in such corporation, and, by statute and by the by-laws of the corporation, is required to pay to the corporation, as a contribution to its capital, one dollar per month as dues upon each share held by her until each share reaches the ultimate value of two hundred dollars, or is withdrawn, cancelled, or forfeited, as provided by law.

“2. Upon the shares held by her, the defendant has contributed, or caused to be contributed, in monthly payments to the corporation, under the statute and its by-laws, and as dues on her shares, in all, the sum of sixty-three dollars.

“3 The books and accounts of the corporation were and are kept according to the requirements of the statutes relating to such corporations, and a certain pass-book was issued or given to the defendant for convenience in keeping the accounts, in which pass-book and on the books of the corporation are entered, or intended to be entered, all sums paid by the defendant as holder of such shares in the corporation as contributions to the capital of the corporation, or dues on the shares so held by her; and

no moneys were credited to her except so far as moneys paid by her upon or towards the payment of the shares held by her may be called credits.

"4. The said corporation has received from the defendant no deposits, properly so called, but has received from her in all the sum named in the answer to Interrogatory 2, as dues on the shares held by her and as a contribution to its capital, and the moneys so received belong to the corporation, and are mingled with its other moneys and loaned to its members according to the provisions of law relating to such corporations.

"5. There was nothing due from the corporation to the defendant at the time of the service of process upon it. The ultimate value of each of the shares held by the defendant will be two hundred dollars; but when the value of each of such shares will reach that sum cannot now be stated. The withdrawal value of the shares at the present time is sixty-two and $\frac{66}{100}$ dollars; but the same can only be withdrawn upon the provisions of law relating to such corporations and in accordance with the by-laws of the corporation; and the corporation, summoned as trustee in this case, denies that it can be charged as trustee for or on account of any money paid it by the defendant on the shares held by her."

In the Superior Court the defendant was defaulted, and the trustee was discharged; and the plaintiffs appealed to this court.

N. C. Berry & J. K. Berry, for the plaintiffs.

C. G. Keyes, for the trustee.

HOLMES, J. It appears from the answers of the corporation summoned as trustee, that it was organized and does business under the Pub. Sts. c. 117; St. 1882, c. 251; St. 1883, c. 98; St. 1885, c. 121; St. 1887, c. 216; that the defendant is a member and holder of nine shares in it, upon which she has paid as dues sixty-three dollars, and that the withdrawal value of the shares is sixty-two dollars and sixty-six cents. The question is whether this sum can be reached by trustee process, or whether the shares can be attached only in the mode provided by the Pub. Sts. c. 161, §§ 71-73, for attaching the shares of a stockholder in a corporation.

If the latter method had been resorted to, it might be argued, no doubt, that as the defendant is a member of the corporation,

and as the statute calls her interest "shares," she is brought expressly within the words of c. 161, §§ 71-73, providing how her shares may be attached. We express no opinion upon that question. But the interest of the member of a corporation of this kind is of a peculiar nature. And it does not follow, because the defendant is a member, that she may not be a creditor also in respect of her money paid in, subject to any lawful deductions incurred under the statute. See, e. g., *Williams v. Parker*, 136 Mass. 204.

Co-operative institutions like the one before us seem first to have appeared as voluntary unincorporated associations. St. 1854, c. 454, § 5. *Merrill v. McIntire*, 18 Gray, 157. *Baxter v. McIntire*, 18 Gray, 168. *Delano v. Wild*, 6 Allen, 1. The incorporation of them simply facilitates carrying out the purposes for which they are formed: on the one hand, of advancing the funds contributed by the members to such of them as make the best offers; and on the other, of dividing the profits, if any, among the shares. In the latter aspect these corporations resemble savings banks, and have been made more and more like them by legislation. They stand in the same relation to the commissioners of savings banks. Pub. Sts. c. 117, § 20. They are subject to similar restrictions as to land purchased by them on foreclosure. § 19. They are required to reserve a guaranty fund from net profits. St. 1885, c. 121. See Pub. Sts. c. 116, § 24. Since the St. of 1883, c. 98, they are called banks. The so called shares are represented, not by certificates of stock, but by entries in a pass-book. Pub. Sts. c. 117, § 17. And the value of them is determined by the amount paid in, plus profits and less fines and losses. When the shares reach the ultimate value of two hundred dollars, they are not to be kept as full paid shares, but are to be paid off. Pub. Sts. c. 117, §§ 7, 9.

By the St. of 1887, c. 216, § 2, (Pub. Sts. c. 117, § 8,) "A member may withdraw his unpledged shares at any time by giving thirty days' notice." That is to say, the member has a right to demand back the money he has paid to the corporation, together with any profits which may have accrued, deducting fines and his share of losses, and this right is one of the terms on which he paid. At the same time, he has no claim to a specific fund. The money which he pays in becomes the money of the

corporation, as in the case of a banker, and in this case the trustee states that it has used the money paid by the defendant as its own. So far, the relation between the corporation and the defendant is that of debtor and creditor, or at least constitutes a contractual or quasi contractual obligation to pay money, by whatever name it may be called in the statute. See *Burt v. Rattle*, 31 Ohio St. 116, 130; *Totten v. Tison*, 54 Ga. 139. The fact that the defendant had not given the required notice does not affect the question. *Clapp v. Hancock Bank*, 1 Allen, 394.

It is true that no more than one half of the funds in the treasury are applicable to the demands of withdrawing members without the consent of the directors. But it is equally true that the liability of a mutual insurance company for a loss is confined to a specific and limited fund. *Commonwealth v. Massachusetts Ins. Co.* 112 Mass. 116, 121. So is that of a savings bank. So, indeed, in a sense, is that of every corporation; since a corporation has no body which can be taken on execution. It would not be argued that a mutual insurance company or a savings bank could not be trustee. Pub. Sts. c. 183, § 33. The trustee does not allege in its answer that the funds are insufficient in fact.

By the statute of 1887 there are to be deducted from the amount standing to the credit of the shares to be withdrawn all fines, and a proportionate part of any unadjusted loss, together with such proportion of the profit previously credited to the shares as the by-laws may provide. But these sums are all capable of ascertainment, and are ascertained by the trustee's answer. The statute provides that the shareholder "shall be paid the balance" thus ascertained. We are of opinion that the shareholder's right to this balance is a credit, or that the balance is "money due the defendant" subject to be taken by trustee process. Pub. Sts. c. 183, §§ 21, 25. See *Gray v. Bennett*, 3 Met. 522, 526.

Trustee charged.

EDMUND H. DUCHEMIN vs. CHARLES B. KENDALL.

Suffolk. March 6, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Contract to sell Shares of Stock — Stock-Jobbing — Equitable Ownership —
Consideration — Option — Tender — Notice — Offer to perform.*

The equitable owner of shares of stock, held for him on a naked trust, consented to his trustee's assigning or agreeing to assign them to trustees, to sell and account to the owner for the proceeds, or if not sold within a year to return them to him, his representatives or assigns. On August 9, 1886, before such sale or return of the shares, a person agreed with such owner to take the shares at the end of a year at the owner's option, if he failed to secure a bid for the stock within that time. On the evening of August 8, 1887, the owner mailed a letter to such person, which in due course of mail would reach him on the next day, notifying him that he expected him to take the stock according to the agreement. No reply was made to the letter, although received, and three days later, upon formal demand by the owner for the price and a tender of the stock which had been returned to him, such person refused to take it or pay the money. *Held*, that the agreement was valid and rested upon sufficient consideration, that the owner was not obliged to make a tender *ad diem*, and that the notice of his election and the offer to perform were sufficient.

CONTRACT for breach of the following agreement in writing: "For one dollar and other valuable considerations, the receipt whereof is hereby acknowledged, I hereby bind myself to secure to E. H. Duchemin a *bona fide* bid of five thousand dollars, for five hundred shares of the Addax Basting Machine Company's stocks, within twelve months from this date. In case of failure so to do, I hereby agree to take from him, at his option, said five hundred shares of stock, for five thousand dollars, one year from the date hereof. Given this ninth day of August, A. D. 1886. C. B. Kendall. Boston, Mass., August 9, 1886." Writ dated August 13, 1887.

Trial in the Superior Court, without a jury, before *Barker, J.*, who found for the defendant, and reported the case for the determination of this court, in substance as follows.

On October 23, 1885, the plaintiff became the owner of one thousand shares of stock in the Addax Basting Machine Company by the indorsement of a certificate for such shares to him. On or about March 10, 1886, he transferred his certificate of such

shares to one Bayley, and received from him a receipt which recited that Bayley was to hold the shares subject to the plaintiff's order for three months from that date. Bayley was simply a naked trustee for the plaintiff in all his dealings with such shares of stock. He subsequently, and without the knowledge of the plaintiff, surrendered the certificate to the company, and received in lieu of it another certificate for such one thousand shares of stock in his own name.

On or about April 2, 1886, Bayley, with the knowledge and consent of the plaintiff, assigned and transferred the new certificate to the defendant and James F. Bliss, who held it as trustees under a certain trust agreement dated February 27, 1886, entered into between them and certain stockholders in the Addax Basting Machine Company, by which, in consideration of the transfer and assignment of such stockholders' shares of stock to them as trustees, the defendant and Bliss agreed "to exert their best efforts to effect sales of the stock so placed in trust, and pay over to the parties of the second part the proceeds of such sales in *pro rata* proportion. All shares not sold at the end of one year from this date shall be returned to their respective owners, their representatives or assigns."

Bayley and other stockholders signed the above agreement, and subsequently, on April 15, 1886, the defendant and Bliss gave to Bayley a receipt for the one thousand shares, reciting that they held the shares under the trust agreement, which receipt Bayley thereupon transferred by indorsement in blank to the plaintiff.

On August 9, 1886, the defendant executed and delivered to the plaintiff the agreement in question, the consideration of which was an agreement by the plaintiff to sell to the defendant five hundred shares of the stock, represented by the trustees' receipt then held by the plaintiff by transfer from Bayley, at one dollar per share, and the execution of the agreement to sell, on the part of the plaintiff, by delivering to the defendant the trustees' receipt for one thousand shares, and receiving from him a like receipt signed by the trustees for five hundred shares and five hundred dollars in cash. At this time the defendant was treasurer of said company. The trustees' receipt for five hundred shares, given by the defendant to the plaintiff on August 9,

1886, was held by him until about March 16, 1887, when he surrendered it to the trustees, and received a certificate from the company for five hundred shares of stock in his own name. This certificate he held until on or about December 3, 1887, when he exchanged the same for a certificate of five hundred shares in the Addax Basting and Stitching Machine Company, the successor to the property of the former company, which last certificate he now holds.

On the evening of August 8, 1887, the plaintiff mailed a letter from Newburyport to the defendant, directed to his usual place of business in Boston, as follows: "Newburyport, August 9, 1887. Mr. C. B. Kendall: Dear Sir, — Please let me know when you will take the Addax Basting Machine stock, as per agreement of August 9, 1886. An early reply will oblige. Yours truly, E. H. Duchemin, 12 Strong Street." This letter was received by the defendant, but no reply was received by the plaintiff.

On or about August 13, 1887, the plaintiff's agent called upon the defendant and tendered him the certificate of five hundred shares of stock in the Addax Basting Machine Company, on behalf of the plaintiff, and demanded of him the five thousand dollars due therefor to the plaintiff, under his agreement. The defendant refused to take the stock and pay the money; nor has he since taken the stock or paid the money therefor, or any part thereof; nor has the defendant obtained for the plaintiff a *bona fide* bid of ten dollars per share for said stock for the plaintiff. The market value of the stock on August 9, 1887, was one dollar per share, and did not change up to the time of the tender by the plaintiff's agent, on August 13, 1887, and the date of the writ in this action. The plaintiff never owned any other stock in the company, and no certificate was ever issued to him other than what appears in the above statement; and no part of the one thousand shares of stock held by the defendant and Bliss, under the trust agreement mentioned above, was sold by them during the continuance of said trust.

If upon the above facts the plaintiff was entitled to recover, judgment was to be rendered for the sum of \$4,500, and interest; otherwise, judgment for the defendant.

C. M. Perry, for the plaintiff.

A. Eastman, for the defendant.

MORTON, C. J. By the contract sued on, the defendant agrees to secure to the plaintiff a *bona fide* bid of five thousand dollars for five hundred shares of the Addax Basting Machine Company's stock, within twelve months from date; or, in case of failure to do so, to take from him at his option said five hundred shares of stock for five thousand dollars in one year from date. The contract is dated August 9, 1886. At this time the plaintiff was the equitable owner of one thousand shares of the stock. This stock stood in the name of the defendant and James F. Bliss, who held it in trust for the plaintiff, who had an equitable interest in it, which was assignable, and his agreement to assign and transfer five hundred of such shares to the defendant, and the execution of this agreement, as set out in the report, furnished a sufficient consideration for the agreement sued on.

The defendant contends that this agreement of the plaintiff is void under § 6 of chapter 78 of the Public Statutes. This statute provides that every contract for the sale of stock shall be void unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner or assignee thereof, or authorized by the owner or assignee, or his agent, to sell or transfer the same.

If we construe the report most favorably to the defendant, the facts appear to be as follows. The plaintiff was the equitable owner of one thousand shares of the stock, which stood in the name of Bayley, who was a naked trustee. Bayley, with the consent of the plaintiff, had, by an instrument dated February 27, 1886, a copy of which is annexed to the report, assigned or agreed to assign the said stock to the defendant and Bliss, as trustees, with power to sell it and account to the owner for the proceeds, or if not sold within a year to return it to the owner, his representatives or assigns. The agreement of the plaintiff operated as an agreement to sell five hundred shares of the stock subject to this power. When executed, it transferred to the defendant all the interest which the plaintiff had in such stock. Such must have been the understanding of both parties. The plaintiff had a right thus to sell his interest. He was the owner of it, and fully authorized to make the sale which he did. The case does not fall within the letter or the spirit of the statute, the purpose of which was to prevent gambling in stocks.

The defendant further contends, that the plaintiff cannot recover because he did not make a tender of the shares at the end of the year. The defendant's promise was that he would procure a bid of five thousand dollars for the stock within twelve months, or, in case of failure so to do, would take from the plaintiff, at his option, the stock for five thousand dollars, one year from the date of the contract. It would be a too strict and harsh construction of the contract to hold that a technical common law tender *ad diem* was necessary in order to save the rights of the plaintiff. Generally, when a party is to deliver a deed or other transfer upon the payment to him of money, it is enough if he offers and is able to give such deed or transfer, without making a formal tender. *Cook v. Doggett*, 2 Allen, 439. *Thorndike v. Locke*, 98 Mass. 340. *Carpenter v. Holcomb*, 105 Mass. 280.

In this case, the plaintiff, on the evening of August 8, 1887, mailed a letter at Newburyport to the defendant at Boston, notifying him, in substance, that the plaintiff expected him to take the stock according to the agreement. It is to be presumed that this by due course of mail reached the defendant on the 9th of August. He was thus notified that the plaintiff availed himself of the option given him by the contract. He made no reply, and on August 13, the plaintiff's agent called on the defendant, tendered him the stock, and demanded the sum of five thousand dollars. The defendant refused to take the stock and pay the money. The refusal was not put upon the ground that the tender was too late, or that the defendant had suffered any injury by the delay, but seems to have been a general refusal. We do not think that, in the contemplation of the parties, it was an essential element of the contract that the stock should be transferred on the precise day when the year expired, and we are of opinion that the tender by the plaintiff was made within a reasonable time, and was a substantial offer on his part to perform the contract. As the defendant refused absolutely to take the stock, the plaintiff was not obliged to keep it for the defendant, but had the right to treat the contract as broken, and to bring this action for such breach.

Judgment for the plaintiff.

CHARLES E. WILLARD & others vs. CITY OF BOSTON.

Suffolk. March 12, 13, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Eminent Domain — Assessment of Damages — Distinct or Separate Interests —
Petition for a Jury — Motion to Dismiss — Answer in Abatement.*

A petition, filed in the Superior Court for the assessment of damages for the taking of land for a highway, alleged that the petitioners owned the land in common; that the whole of it was leased for years; that an undivided part of it was subject to a mortgage, only the date and record of which were given; and that the petition was brought under the Pub. Sta. c. 49, §§ 18, 19. Before a jury was impanelled the lessee filed a motion to dismiss the petition, because, as he alleged, a like petition had been brought by him under the Pub. Sta. c. 49, §§ 20-24; and the petition was dismissed. *Held*, on appeal, that the petition was erroneously dismissed.

PETITION, filed April 6, 1888, by Charles E. Willard, Caroline I. Abbott, and Carrie F. Abbott, to the Superior Court, for a jury to assess the damages for the taking of land for a highway in Boston.

The petition alleged that Willard, who was an insane person and appeared by his duly appointed guardian, and the Abbotts, at the date of the taking were together the owners in fee of the land in question, which was described by metes and bounds, together with a wharf and buildings thereon, Willard owning one undivided half of it and the Abbotts together owning the other undivided half; that Charles E. Dearborn had at the date of the taking a written lease of all the premises, dated May 28, 1887, which was to run for five years and six months from July 1, 1887; that the city of Boston, upon proceedings duly had for the purpose of widening Commonwealth Avenue in that city, proceeded to take, and did take, the land in question, and had laid it out as a public highway. The petition concluded as follows:

“That said city of Boston was bound to render satisfaction and award full compensation to the parties owning said property for said property so taken, and for all other damages, but it has failed so to do, and is unwilling to award, and has failed to award, adequate damages therefor.

"That the petitioners and said Dearborn, having a claim for such damages sustained in their property by said taking, have different and separate interests in the property, so that a term for years in the whole of the same belongs to said Charles E. Dearborn, and the whole of the reversion belongs to your petitioners (taken together); and that by the provisions of Pub. Sts. c. 49, §§ 18, 19, applicable to this case, entire damages for said taking should be assessed, without any apportionment thereof, and the amount of such damages should be paid over to a trustee, to be appointed as provided in said sections, to be held by him upon the trust mentioned in said sections.

"That your petitioners, being aggrieved by said action of said city of Boston in the estimation of their damages, hereby apply to this court for a jury to assess said damages according to law, and pray that a notice may be served upon said city, and that notice may also be served upon said Charles E. Dearborn, and also upon Sophia K. Fairbank, of said Boston, executrix of the will of Joseph B. V. Fairbank, late of said Boston, deceased, said deceased being the mortgagee named in a mortgage given by said Willard of his undivided half of the premises, dated July 2, 1883, recorded with Suffolk deeds, lib. 1605, fol. 277, that they may, if they see cause, appear and become parties to the proceedings under this petition; and the petitioners pray that such proceedings may be had and such relief granted as law and justice may require in the premises."

The following motion was filed to dismiss the petition :

"And now Charles E. Dearborn, upon whom service of said petition has been made, as a party interested therein, comes into court, and moves that said petition be dismissed for the following reasons :

"1. Because said petition, as appears upon the face thereof, is brought under §§ 18, 19, of chapter 49 of the Public Statutes, whereas, upon the statement of fact therein set forth, the same should have been brought under §§ 20, 21, 22, 23, and 24 of said chapter 49.

"2. Because a petition for damages for the taking of the same land described in said petition, entitled 'Charles E. Dearborn v. City of Boston,' in which all the parties named in said petition of Charles E. Willard *et al.* were duly made parties and served

with process, was filed in said court prior to the filing of said petition of Charles E. Willard *et al.*, and is now pending in said court; and said petition was duly filed under said §§ 20, 21, 22, 23, and 24, which are the sections properly applicable to the statements of fact set forth in both said petitions."

In the Superior Court the petition was dismissed; and the petitioners appealed to this court.

T. P. Proctor, (*E. Tappan* with him,) for the Abbotts.

C. C. Read, for the guardian of Willard.

W. Gaston & *W. B. Durant*, for Dearborn.

MORTON, C. J. This is a petition under chapter 49 of the Public Statutes, for the assessment of damages for land taken for a highway. The only question argued is whether the proceedings upon it should be conducted under § 18 of that chapter, or under § 20 and the following sections. This question is not properly before us on a motion to dismiss the petition. The allegation in the petition that § 18 of the statute is applicable to the case is not an allegation of a substantive fact which would prevent the court from entertaining the petition, although it might hold that the subsequent proceedings should be conducted under § 20. If, as was stated at the argument, a prior petition has been filed by one of the parties in interest, the defendant should avail itself of this fact by an answer in the nature of a plea in abatement. It does not therefore appear upon the record before us, and we cannot regard it as a fact. The petition is sufficient, and, upon the record transmitted to us, the order dismissing it was erroneous. If this was merely a technical objection, and we were duly informed of all the facts in the case, we should be inclined to overlook it. But the question whether the proceedings shall be according to § 18 or according to § 20 must depend upon the state of facts shown to exist when the jury is impanelled. Perhaps we might assume that the petition correctly states the title to the land taken. But as to the mortgage, the effect of which presents the most difficult question in the case, there is not a sufficient statement. It is merely stated that there is a mortgage of an undivided half, dated July 2, 1883. It does not appear whether it is a mortgage to secure a sum of money lent, or to secure some future contingent liability; whether there has been a breach of

the condition ; whether the mortgagee is or is not in possession ; nor whether the mortgagee intends to appear as a party, or, as was intimated at the argument, intends to waive his rights. It will be settled at the hearing in the Superior Court what the facts are. Until they are settled, we cannot know what questions of law will be raised. We are not called upon to decide speculative questions, or to determine what are the rights of parties under all possible facts, but only to determine their rights under the facts which actually exist in a case.

The motion to dismiss must be overruled, and the case must stand for further proceedings in the Superior Court.

Motion to dismiss overruled.

COMMONWEALTH vs. JAMES T. LEE.

Suffolk. April 1, 1889. — May 9, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

False Pretences — Indictment — Mortgage — Merger — Knowledge.

One who obtains goods to be delivered to him from time to time by giving a mortgage of personal property which he falsely represents that he owns, is guilty of obtaining goods by false pretences, under the Pub. Sta. c. 208, § 59, the false pretence being a continuing one, and applicable to each delivery of goods.

An averment in an indictment for such an offence that goods bought were obtained by the false statement on the part of the buyer that he was the owner of certain property, upon which he gave a mortgage to the seller, thereby inducing him to part with the goods, is a clear and sufficient charge of obtaining goods on false pretences, such false pretence being the direct, and not the remote, means of obtaining the goods, even if they would not have been delivered but for the giving of the mortgage.

At the trial of such an indictment there was evidence that the seller parted with the goods on the strength of the buyer's "statements and the mortgage," which statements were false ; and that the seller had been warned by the true owner not to deal with the buyer with respect to such property. The presiding judge refused to rule that there was no evidence to support the charge as laid, or that the false pretence was merged in the mortgage, or that, if the seller had the means of knowing that the property was another's, the buyer could not be convicted. *Held*, that the defendant had no ground of exception.

Upon such an indictment it is only necessary to prove that some definite portion of the goods were obtained by means of the alleged false pretence.

INDICTMENT for obtaining goods by false pretences, alleging that the defendant, "with intent to cheat and defraud Worthen T. James, and with the view and intent, by means of the false pretences and representations hereinafter set forth, to effect the sale by said Worthen to said Lee of the property and goods of said Worthen hereinafter set forth, and to obtain and get into his, said Lee's, hands and possession the property, goods, and chattels of said Worthen, hereinafter mentioned, upon credit and with the intention not to pay for the same, did then and there unlawfully, knowingly, and designedly falsely pretend and represent to said Worthen that he, said Lee, then and there owned in his own name and right" three horses, a wagon, and a harness; "that all and each of said articles of property were then and there free and clear from all incumbrances, and that he, said Lee, was then and there the lawful owner of them; that he, said Lee, then and there had good right to convey said articles of property to said Worthen by way of mortgage, to secure him, said Worthen, from loss, by reason of his, said Lee's, failure and neglect to pay for certain articles of property hereinafter set forth, which he, said Lee, then and there desired to purchase and obtain from said Worthen upon credit, and said Lee then and there asked and requested said Worthen in consideration thereof then and there to sell and deliver to him, said Lee, upon credit," beer in barrels and bottles, "and then and there to take and receive from him, said Lee, as security to him, said Worthen, for the payment for said last mentioned articles of property by him, said Lee, to him, said Worthen, his, said Lee's, mortgage upon and of said articles of property first above set forth, and the said Worthen, then and there believing the said false pretences and representations so made as aforesaid by the said Lee, and being deceived thereby, was induced by reason of the false pretences and representations so made as aforesaid to sell and deliver, and did then and there sell and deliver to the said Lee upon credit," certain barrels, kegs and cases of bottles of beer; "all of the property, goods, wares, merchandise, chattels, and effects of said Worthen, and all of which he, said Lee, did then and there receive from said Worthen, as and for such sale upon credit as aforesaid; and to receive, and did then and there receive, as such security for the payment by him, said Lee, to

him, said Worthen, for said last mentioned articles of property, by the due delivery thereof then and there made to said Worthen by said Lee, his, said Lee's, mortgage upon and of said first mentioned articles of property to him, said Worthen; and the said Lee did then and there receive and obtain the said property, moneys, goods, merchandise, chattels, and effects of the said Worthen by means of the false pretences and representations aforesaid, and with intent to cheat and defraud: whereas, in truth and in fact, he, said Lee, did not then and there own in his own name and right the said articles of property, to wit, said horses, wagon, and harness as aforesaid; and said last mentioned articles of property were not then and there free and clear from all incumbrances, and he, said Lee, was not then and there the lawful owner of them as aforesaid; and he, said Lee, did not then and there have good right to convey said articles of property to said Worthen by way of mortgage to secure him, said Worthen, from loss by reason of his, said Lee's, failure and neglect to pay for certain articles of property, which he, said Lee, then and there desired to purchase and obtain from said Worthen upon credit as aforesaid; all of which he, said Lee, then and there well knew."

In the Superior Court, before the jury were impanelled, the defendant filed a motion to quash the indictment for the following among other reasons: "1st. Because the said indictment does not sufficiently allege that Worthen T. James, the person to whom the alleged false pretences were made, sold and delivered the property mentioned therein by reason of said false pretences, nor that said false pretences were the inducement for said James to part with said property. 2d. Because said false pretences, as alleged, show that they were an inducement merely to the giving of the mortgage, and that the obtaining of the said property is too remotely connected with said false pretences." *Dunbar, J.*, overruled the motion.

At the trial, James testified that the defendant came into his store in Boston on November 20, 1885, and upon being told that he could not have more goods on credit because of the amount of his previous indebtedness to James, stated that he had property, and that he would give him security, and finally agreed to give him a mortgage on the horses, wagon, and harness; that

the defendant represented that he was the owner of such property, and that it was free from incumbrances; that the defendant thereupon gave him a mortgage upon the property, and he delivered to him the beer in packages as recited in the indictment; and that he believed the statement made by the defendant relative to the ownership of the property, and was induced by such representations to deliver such beer to the defendant.

It appeared in evidence, that the horses, wagon, and harness were not the property of the defendant, as he at the time of the making of the representations knew. It further appeared in evidence, without objection, that the defendant subsequently obtained from James other property which he did not pay for, and that, when asked by James if he wished to pay for the goods, the defendant said, "No, let them go in on the mortgage."

On cross-examination, James testified that, in letting the defendant have the beer, he relied on the defendant's "statements and the mortgage, — the mortgage was the security"; and that the bargain which he made with the defendant was that he should take the mortgage for three hundred dollars, which was to include one hundred dollars already owed him by the defendant, and two hundred dollars' worth of goods which the defendant was to take as he might wish them.

There was also evidence tending to show that James had been warned by the true owner of the property mortgaged not to deal with the defendant with reference to it, as the property did not belong to him, but belonged to such owner.

At the close of the evidence, the defendant asked the judge to rule that the evidence adduced did not support the false pretences charged in the indictment; but the judge declined so to rule, and the defendant excepted.

The defendant also asked the judge to instruct the jury, among other things not material, as follows:

"2. If the jury find that, before the making of the false pretences, James knew, or had means of knowing, that said property was not the defendant's, this indictment cannot be sustained.

"3. If the jury find that, before the making of the alleged false pretences, James believed the said property to be the property of the defendant, so that the making of the alleged false

pretences was merely a restatement of what James previously believed to be true, then this indictment cannot be sustained.

"4. If the jury find that the bargain in which the alleged false pretences were made, and its object, were to secure James for a past debt and a future credit, then the defendant cannot be convicted under this indictment.

"5. What passed between the parties by parol in relation to the title to the property merged afterwards in the mortgage, and the evidence, show a mere breach of covenants in the mortgage, and unless the jury find that some other false pretences were made besides those to which the covenants in the mortgage relate, the defendant cannot be convicted."

The judge gave the second request, omitting the words "or had means of knowing"; the third, adding the words, "This is necessarily so, because, if James believed the property to be owned by the defendant previous to the statement relied upon, James could not have relied upon the statements"; and the fourth, adding the words, "If the defendant, at the time such representations were made, obtained any of the property charged in the indictment from said James by reason of the alleged false pretences, the indictment might be sustained." The judge declined to give the fifth instruction requested, and upon that subject instructed the jury that the defendant could not be convicted by reason of breach of the covenants in the mortgage; but if they found that the defendant made the false statements relied upon, he would not be less liable because those statements were afterwards reduced to writing in the mortgage.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. B. Orcutt, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

DEVENS, J. 1. The motion to quash the indictment was properly overruled. The allegation that the goods were obtained by the false statement, on the part of the defendant, that he was the owner of certain property upon which he gave a mortgage to the seller, one James, thereby inducing him to part with his goods, was a clear and sufficient charge of obtaining goods by false pretences. If, after this false pretence

that the defendant was the owner of the property to be mortgaged, the mortgage was given, even if the goods would not have been delivered to the defendant but for this fact, the false pretence was the direct, and not the remote, means by which the goods were obtained. If the seller had not believed in this pretence, he would have deemed the mortgage worthless, and would not have parted with his property. *Commonwealth v. Coe*, 115 Mass. 481. In *Commonwealth v. Lincoln*, 11 Allen, 233, it was held that one who obtains money by means of false pretences that he owns certain personal property, which he mortgages to the lender as security for the loan, could properly be convicted of obtaining money by false pretences. The fact that in the case at bar the goods were to be obtained from time to time, and not all at once, can make no distinction between the cases, as the false pretence was a continuing one, and applicable to each delivery.

2. The ruling requested, that the evidence did not support the charge of false pretences as laid in the indictment, should not have been given. In distinct terms, the witness James testified that he parted with the goods on the strength of the statement made by the defendant, and also on the "statements and the mortgage," which, in substance, was saying that he relied on the mortgage because of the statements of the defendant which preceded or accompanied it. These statements the jury have found to be false pretences. If James parted with his property solely on the strength of the security of the note and mortgage, that is, independently of these statements, they were instructed to acquit the defendant. For similar reasons, the fifth instruction requested should not have been given. While the defendant was not to be convicted by reason of the covenants in the mortgage as to the ownership of the property, if he in fact made the false statements relied upon to induce the seller to part with his property on the security of the mortgage, he would not be the less liable because they were subsequently reduced to writing therein.

3. The instruction, that the indictment could not be sustained if James, the seller, had the means of knowing that the property was not that of the defendant, should not have been given. He was entitled to rely on the statements of the defendant, and was

not further put upon his inquiry as to a motive which was within the knowledge of the defendant, and as to which he himself knew nothing. If he knew that the defendant was not the owner, the instruction as given was that the statement could not be deemed a false pretence. Nor is any such case presented as that which exists where parties alike know whether an affirmation is true or false, being equally cognizant of, or personally connected with, the facts to which it relates. *Commonwealth v. Norton*, 11 Allen, 266.

4. The fourth instruction requested by the defendant was given. The addition that, if the defendant, "at the time such representations were made, obtained any of the property charged in the indictment from said James by reason of the alleged false pretences, the indictment might be sustained," was correct. It compelled the Commonwealth to show that some definite portion of the property charged in the indictment had been obtained by the alleged false pretences. This was all that was necessary to sustain the indictment. *Commonwealth v. Stone*, 4 Met. 43. *Commonwealth v. Coe*, 115 Mass. 481.

Exceptions overruled.

WILLIAM S. GOLDTHWAIT vs. AMOS P. DAY.

Essex. March 1, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN,
& HOLMES, JJ.

*Equity Pleading — Mutual Account — Set-off — Partnership Accounting —
Insolvent Debtor.*

A bill in equity upon a mutual account imports an offer on the part of the plaintiff to pay any balance that may be found due from him to the defendant, and cross items upon such an account in the defendant's favor are not matters of set-off, and need not be pleaded to be availed of except when the whole account is set out in the answer.

The Pub. Sts. c. 137, § 81, which provide that no action shall be maintained against an executor or administrator after an estate has been represented insolvent, except in certain cases, do not apply to a bill in equity brought by the administrator of a deceased partner whose estate is afterwards declared insolvent against his surviving partner for an account; and the defendant is entitled to a decree if a balance is found due in his favor.

Upon such a bill in equity the defendant is entitled to be credited for firm debts paid by him more than two years after the administrator had given bond, but not for a note given by the intestate to him in payment of a balance due him on the account at a certain date.

HOLMES, J. This is a bill for an account, brought by the administrator of a deceased partner against the surviving partner. The case was referred to a master to state the account, and he has reported that the sum of eighteen hundred and thirty-one dollars and fifty-nine cents is due the defendant. Nearly three months after the bill was filed, the estate of the plaintiff's intestate was represented insolvent, and commissioners were appointed. The plaintiff excepts to the master's report, on the ground that the defendant's only remedy was to prove his claim before the commissioners.

We need not consider whether this objection is taken prematurely, as we are of opinion that it cannot prevail. It is based upon the Pub. Sts. c. 137, § 31, which provide that no action shall be maintained against an executor or administrator after an estate has been represented insolvent, except in certain cases. The plaintiff does not deny that, if he had sued upon a cause of action at common law and the defendant had pleaded in set-off before the estate had been represented insolvent, a judgment might have been entered for the defendant, notwithstanding the representation. *Perkins v. Fellows*, 136 Mass. 294. A declaration in set-off, as clearly as a suit by the defendant, would be within the exception to the Pub. Sts. c. 137, § 31, that, if an action is pending for a demand which is disputed, the action may be tried, and judgment may be rendered. But the plaintiff says that in this case no set-off has been pleaded, and also that the defendant's demand is equitable in its nature, and not within the exception just mentioned, although he says that it is within the general prohibition of the section, since the St. of 1884, c. 293, put equitable liabilities on the footing of debts.

If it were necessary to invoke the exception just mentioned, it would seem plain that the exception as to pending actions is as broad as the prohibition against bringing new actions, and that, if a demand like the defendant's is within the one, it is within the other. But the true view is, that the Pub. Sts. c. 137, § 31, have nothing to do with the case.

When a bill in equity is brought upon a mutual account, the cross items in favor of the defendant are not matters of set-off. A set-off is a creation of statute. It is an independent claim which the statute allows the defendant to consolidate with the plaintiff's action by pleading it, if he chooses, subject to substantially the same defences as if he had sued upon it separately. On the other hand, a mutual account exists by agreement, and the effect of it is that the cross items extinguish each other *pro tanto* at once, as they accrue. The only claim of either party is to the balance. See *Fanning v. Chadwick*, 3 Pick. 420; *Tyler v. Boyce*, 135 Mass. 558, 561; *In re River Steamer Co.* L. R. 6 Ch. 822, 880; *Grove v. Dubois*, 1 T. R. 112, 115, 116; *Tompkins v. Willshear*, 5 Taunt. 431, 432, and note *a*; *Farrington v. Lee*, 2 Mod. 311, 312, and 1 Mod. 268, 269. When a bill is brought upon such an account, it implies that there are items on both sides, and that the balance is uncertain until ascertained by aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. *Colombian Government v. Rothschild*, 1 Sim. 94, 103. *Clarke v. Tipping*, 4 Beav. 588.

Under such a bill, the defendant has nothing to plead in order to get the advantage of it. His claim is not an independent one, but is admitted and asserted by the plaintiff, so far as the defendant can prove his items and provided they exceed those on the plaintiff's side. Those items are not to be pleaded except when the defendant sets out the whole account in his answer. It follows, that from the filing of the bill the defendant stood at least as well with reference to the bar of the Pub. Sts. c. 137, § 31, as he would have stood after pleading in set-off when an answer in set-off is proper. But as his right under the bill is not a cross claim or suit against the administrator, but only a necessary incident of a suit by the administrator of the insolvent estate, it follows that the statute has no application.

The decree for the defendant, when it has been entered, will be within the words or the equity of § 33. No process will issue to enforce it, but it will be presented to the commissioners as is provided in that section concerning judgments.

It is objected that the master credited the defendant on account of payments of partnership debts which were made more than two years after the administrator had given bond, and that these items are barred. Pub. Sts. c. 136, § 9. If this objection is open, it is enough to say that the defendant was bound to pay these debts, and that his claim accrued upon payment. *Hayward v. Hapgood*, 4 Gray, 437. *Phillips v. Blatchford*, 137 Mass. 510, 515. It is true that the plaintiff was also liable to the firm creditors by the Pub. Sts. c. 136, § 8, and it may be that their claims against him were barred before they were paid. But that does not affect the defendant. *Thayer v. Daniels*, 110 Mass. 345.

The plaintiff also excepts to the allowance of nine hundred and forty-two dollars and fifty cents, being the amount due on a promissory note for one thousand dollars, given by the plaintiff's intestate to the defendant on February 8, 1882, as an item in the account. This exception must be sustained. The master reports that the note was given in payment of the balance due the defendant on partnership account at the end of the year 1881. This being so, the mutual account was settled up to that time, and the note was a distinct liability, withdrawn from the mutual account, on which the defendant could have sued, and which he should have proved before the commissioners.

Decree accordingly.

F. L. Evans, for the plaintiff.

G. Wheatland & P. J. McCusker, for the defendant.

JOHN H. DAWE vs. CHARLES W. MORRIS.

Suffolk. March 7, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Action for Deceit — Declaration — Demurrer — Representation.

A declaration in a count in tort for deceit alleged that the defendant, in order to induce the plaintiff to make a contract with a railroad company to build a section of its road, falsely represented that he and another had bought enough rails at a certain price to build it, and that, if the plaintiff would enter into such a contract, they would sell to him at the same price the rails already pur-

chased by them; that the plaintiff, believing such representations to be true, and relying thereon, was thereby induced to enter into a contract with the company for the construction of the section of road, and entered upon its performance; that the defendant and such other had not then purchased the rails, or any part of them, as the defendant then knew, and therefore did not sell, and did not intend to sell, rails so purchased to the plaintiff; that the plaintiff, under his contract, which he was induced to enter into by reason of the false and fraudulent representations of the defendant, was obliged to purchase the requisite number of rails, and to pay a large price for them; and that by reason of the failure of the defendant to furnish the rails the plaintiff was greatly damaged before he discovered that the defendant had not purchased the rails. *Held*, on demurrer, that the declaration did not set forth a good cause of action.

TORT. The first count of the declaration was as follows: "And the plaintiff says that the defendant, in order to induce the plaintiff to make a contract with the Florida Midland Railway Company for the building of about thirty miles of the Florida Midland Railway in Florida, falsely represented that he, said Morris, and one Page had purchased certain rails sufficient to build a certain number of miles of railroad, to wit, thirty miles, at a certain sum per ton, to wit, the sum of eighteen dollars less freight to New York, and that, if said plaintiff would make a contract with said company for building said part of said railway, they, said defendant and said Page, would sell those said rails already purchased by them to the plaintiff at said price per ton; and the plaintiff, believing said representations were true, was thereby induced to enter into a contract, and did enter into a contract with said company for the construction of about thirty miles of said railroad, and entered upon the performance of said contract with said railway company; and said Page and said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff; and by reason of the said contract made by the plaintiff with said railway company, which said contract said plaintiff was induced to enter into by reason of the false and fraudulent representations of the defendant as aforesaid, said plaintiff was obliged to purchase, and did purchase, a large number of rails, to wit, rails sufficient to build about twenty-two miles of railroad, and to pay, and did pay, therefor a large sum, to wit, the sum of forty dollars per ton, and was also by reason thereof obliged to purchase, and did purchase, a large

number of rails, to wit, rails sufficient to build about eight miles of railroad, and to pay therefor, and did pay therefor, a large sum, to wit, the sum of twenty-four dollars per ton; that said plaintiff, relying upon the representations of the defendant as aforesaid, had entered upon the performance of his said contract with said railway company, and that by the reason of the failure of said defendant to furnish said rails, said plaintiff was greatly damaged before he discovered that said defendant had not purchased said rails."

The second count of the declaration alleged that the defendant had "converted to his own use a number of bonds, to wit, thirty-three, of the Florida Midland Railway Company, of the par value of one thousand dollars each, the said bonds being the property of the plaintiff."

The defendant demurred to the first count, on the ground that the declaration did not set forth a legal cause of action.

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

F. A. Wyman & A. A. Wyman, for the plaintiff.

J. B. Warner, (*H. E. Warner* with him,) for the defendant.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. The plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails so purchased to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. If the formalities required by law in order that contracts for the sale and delivery of goods of the value here in question had been complied with, that these facts would constitute a contract upon a valuable consideration, will not be questioned. The plaintiff does not seek to recover upon this contract, but in an action of tort in the nature of deceit, because he was induced to enter into

the contract with the Florida Railway Company by reason of the representations above set forth.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff. *Knoulton v. Keenan*, 146 Mass. 86.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant and immaterial. Had the defendant actually sold, or had he been ready to sell, the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

It is urged that, independent of any promise to sell to him, if the plaintiff had believed that the defendant had purchased rails at the price at which he said he had purchased them, the plaintiff might thus have been induced to believe that he himself could thereafter purchase them at the same price. But the injury from a false representation must be direct, and the probability or possibility that, because the defendant had purchased at a particular price, the plaintiff would be able, or might believe himself to be able, to do so also, is too remote to afford any ground for action.

It must be shown, not only that the defendant has committed a tort and that the plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and

such as can be clearly defined and ascertained. *Lamb v. Stone*, 11 Pick. 527. *Bradley v. Fuller*, 118 Mass. 289. Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased.

It is also said, that if the plaintiff believed that the defendant had actually purchased the rails, at the time of the transaction, and that if he knew that the completion of the railroad was of vital importance to the interests of the defendant, he would more readily have confided in the defendant's promise to sell them, and thus that this representation was material. But in order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affect the probability that it will be kept, it is collateral to it. "Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient." *Hedden v. Griffin*, 136 Mass. 229.

Whether the allegation as to the purchase of the rails by the defendant was material was a question for the court, which was to construe the contract, and determine its legal effect on the duties and liabilities of the parties. It was for it to determine (there being on the declaration of the plaintiff no dispute as to the facts) whether the alleged misrepresentations were material, and such as would invalidate the contract or form the foundation of an action of tort. *Penn Ins. Co. v. Crane*, 134 Mass. 56.

The plaintiff further contends that, as when goods have been obtained under the form of a purchase with the intent not to pay for them, the seller may, on discovery of this, rescind the contract and repossess himself of the goods as against the purchaser or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise which, at the time of making, the promisor intended not to perform, by reason of which non-performance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise.

Assuming that the plaintiff's declaration enables him to raise this question, which may be doubted, as the averment that "said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff," is not an averment that the defendant intended not to perform his contract, there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a tort would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

It was not disputed that the plaintiff's declaration sets forth in the second count a good cause of action. The result is, that as to the first count the entry must be,

Judgment for the defendant affirmed.

HELEN C. PRINCE vs. CITY OF LYNN.

Suffolk. March 7, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

City of Lynn — Charter and Ordinance — Superintendent of Streets — Agency — Negligence.

The charter of the city of Lynn (St. 1850, c. 184,) confers the power in § 8 upon its city council, as it may by ordinance determine, to "appoint or elect all subordinate officers, not herein otherwise directed, for the ensuing year, define their duties, and fix their compensations, in cases where such duties and compensations shall not be defined and fixed by the laws of this Commonwealth"; and the street ordinance of the city of 1879 provides, in § 26, that there shall be elected by ballot "a superintendent of streets, who shall perform the duties and exercise the powers of a surveyor of highways under the statutes of the Commonwealth," and that "he shall continue in office until removal, or until a successor be chosen and sworn to the faithful performance of his duty", and in § 27, that the superintendent of streets shall perform his duties "under the

care and direction of the mayor and aldermen." *Held*, that the superintendent of streets of that city is a public officer, for whose negligence while performing his official duties it is not liable.

TORT for personal injuries sustained by the plaintiff while travelling upon a highway in the defendant city, through its alleged negligence or that of its agents or servants. Trial in the Superior Court, before *Hammond*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion.

H. F. May, for the plaintiff.

J. W. Berry, for the defendant.

DEVENS, J. The plaintiff seeks in an action of tort at common law to recover damages against the defendant for the alleged negligence of the superintendent of streets of the city of Lynn in making certain repairs in one of the streets in that city, by which negligence she was injured while lawfully using such street. Conceding the general proposition that a town is not responsible for the acts of public officers while engaged in the performance of their duties as prescribed and regulated by the statute, she contends that the case at bar comes within that class of cases in which it has been held that a town is responsible when, assuming for itself the conduct and management of work such as that in which the superintendent was engaged, it intrusts the work to agents of its own whom it directs and controls. *Walcott v. Swampscott*, 1 Allen, 101. *Hawks v. Charlemont*, 107 Mass. 414. *Deane v. Randolph*, 132 Mass. 475. *Waldron v. Haverhill*, 143 Mass. 582. *Doherty v. Braintree*, 148 Mass. 495.

By the charter of the city of Lynn, the power, in such manner as its city council may determine by any by-law made for the purpose, to "appoint or elect all subordinate officers, not herein otherwise directed, for the ensuing year, define their duties, and fix their compensations, in cases where such duties and compensations shall not be defined and fixed by the laws of this Commonwealth," was conferred upon the city council. St. 1850, c. 184, § 8. Such superintendent was duly elected under the street ordinance of the city of 1879, § 26, which provided that there should be elected by ballot "a superintendent of streets, who shall perform the duties and exercise the powers of a surveyor of highways under the statutes of the Commonwealth. He shall con-

tinue in office until removal, or until a successor be chosen and sworn to the faithful performance of his duty." Although the ordinance had given this officer the name of superintendent, he was still a surveyor of highways, whose powers and duties were defined by reference to the statutes of the Commonwealth. It was under the authority thus given him that he was acting in repairing the streets when the alleged injury to the plaintiff occurred. The laborers employed were hired by him, and no evidence was offered that in doing that in which he was engaged he was proceeding under any express vote of the city or any immediate direction from its officers. By § 27 of the same ordinance of the city, it is provided that the superintendent shall perform his duties "under the care and direction of the mayor and aldermen," etc.; and it is the contention of the plaintiff, that by reason of this fact the city has created a new officer, who is its agent, and not merely adopted a mode of filling an existing statutory office. The expenditure of the money intrusted to highway surveyors for the repair of highways in towns is to be under the direction of the selectmen, yet it has been held that this does not render the highway surveyor the less a public officer. The performance of the work, the control and direction of the laborers is still his. Pub. Sts. c. 52, § 3. *Walcott v. Swampscott*, 1 Allen, 101. *McKenna v. Kimball*, 145 Mass. 555. *Clark v. Easton*, 146 Mass. 48. *Pratt v. Weymouth*, 147 Mass. 245. The mere fact that the mayor and aldermen may give such general direction as shall cause the money intrusted to the superintendent to be judiciously expended, does not make the city responsible for his acts while performing the duties required of him by law in the repair of the highways. That "the care and direction of the mayor and aldermen" was only that which is contemplated by the Pub. Sts. c. 52, § 3, and that there was no purpose thereby of assuming to control the superintendent in the performance of his work, is clearly shown by the ordinance, which concludes, "and the city shall not be responsible for any of his acts that have not been ordered by the city council or the board of mayor and aldermen, or sanctioned by express vote."

Nor are we of opinion that, because, while the ordinance provides for the annual election of superintendent of streets, it also

provides that "he shall continue in office until removal, or until a successor be chosen and sworn to the faithful performance of his duty," this officer has been made an agent of the city. Whatever may be the effect of this provision as to the tenure of the office, the superintendent whose conduct has here been brought into question was regularly chosen to perform the duties and exercise the powers of a surveyor of highways. In the performance of these duties and the exercise of these powers, he was subjected to the responsibilities of a public officer, and was not the agent of the city. It is not necessary to discuss whether he could lawfully have been removed during the term for which he was chosen, or whether his term of office could have been extended by the failure of the city council to choose his successor.

Exceptions overruled.

BARNEY CROSSAN vs. NEW YORK AND NEW ENGLAND
RAILROAD COMPANY.

Suffolk. March 11, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Carrier by Railroad — Connecting Line — Contract — Lien for Freight
— Conversion.*

A carrier by railroad made a written contract with a shipper for the transportation of horses over its own and a connecting line, of which it was not the agent, and in making up the total freight, which the shipper prepaid, allowed less for the carriage over the connecting line than by the tariff of the latter it should have done; and the connecting carrier, upon the arrival of the horses at their destination, refused to deliver them unless the additional freight was paid to it by the shipper. *Held*, in an action for conversion, that the connecting carrier acquired a lien on the horses for the additional freight, although when it accepted them for carriage it might have had notice from the way-bill that there had been an attempt to prepay the freight, and although the contract was shown to it before it refused to deliver the horses.

In such action it was *held* that the shipper was not entitled to go to the jury on allegations of unreasonable delay in the transportation, and of detention of the horses upon the cars, there being no evidence of such delay after their arrival, and the consequences of their subsequent detention being alleged only as a matter of aggravation of a wrongful refusal to deliver them; and that, the refusal to deliver the horses being rightful, negligence, if any, in the care of them while detained, could not be relied upon as a substantive cause of action

HOLMES, J. This is an action of trover for the conversion of nineteen horses. The horses were shipped by the plaintiff on the Pennsylvania Railroad at Philadelphia for Boston, were delivered by that company to another at Jersey City, and were carried the last part of the way over the defendant's line. The plaintiff prepaid the freight demanded, which was forty-four dollars. But the Pennsylvania Railroad, in making up the total, allowed only thirty-two dollars for carriage east of Jersey City, instead of fifty dollars as it should have done by the defendant's tariff, so that there were eighteen dollars still to be paid if the defendant was to receive its usual rate.

At the time the defendant accepted the goods for carriage, it had notice of the contents of the way-bill, from which perhaps a jury might have inferred that a railroad agent versed in its abbreviations would have understood that there had been an attempt and an intention to prepay the freight. It had not seen the written contract between the plaintiff and the Pennsylvania Railroad. This contract was shown to the defendant before the refusal of the latter to deliver. It contained the words "Frt 44.00 prepaid," and also a promise by the plaintiff to pay the Pennsylvania Railroad at the rate of twenty-two cents per hundred pounds, which would make the total forty-four dollars. On the other hand, it showed that the horses were to be carried to Boston, and it did not purport to bind the Pennsylvania Railroad as a carrier for the whole distance, but contemplated delivery to other carriers not specified. We are to take it also that the Pennsylvania Railroad was not the agent of the defendant, as the plaintiff's counsel disclaimed that ground. When the horses arrived at Boston, the defendant refused to deliver them except upon payment of the amount unpaid, which is the alleged conversion. The verdict was for the defendant.

The question is, whether the defendant had a lien for the freight due to it according to its schedule and unpaid. The answer is not to be found in the letter of the document, but in general principles of law and considerations of policy. The plaintiff contends that the Pennsylvania Railroad was a special agent, having no ostensible authority greater than that which he actually intended to give it, or at least that, if the defendant had notice that he had prepaid the freight demanded, it had

notice that the Pennsylvania Railroad had no authority to give it a lien for any further sum which the defendant might be entitled to demand. This view is not without sanction. *Marsh v. Union Pacific Railway*, 3 McCrary, 286.

But we think that there are weightier considerations in favor of the defendant. Suppose that it had had the facts definitely before it, it would have seen, to be sure, that the plaintiff did not contemplate paying any more money, but it would have seen also that he did contemplate and desire that the horses should be carried through to Boston by a continuous and speedy passage. The existence of the latter expectation is confirmed by the plaintiff's declaration, and by his testimony. He was not entitled to have both his expectations made good by the defendant. An unforeseen case had arisen, and the defendant was called on by the plaintiff's forwarding agent to act at once in some way. *Potts v. New York & New England Railroad*, 181 Mass. 455. The forwarding agent, whatever its obligations to the plaintiff, only consented to be liable personally to the defendant for thirty-two dollars, but required the defendant to forward the goods. The defendant was not bound to carry for less than its full charge, if it had any right to do so. But if the demand to forward was authorized ostensibly, or by implication, that is to say, if the carriage would give it a lien, it was liable to the plaintiff if it refused, except that it might demand prepayment. The plaintiff was not present, and it might take time and cost money to communicate with him; the horses were perishable, and their keep would probably have cost more than the unpaid freight if they had been delayed; although we do not now decide whether these last facts make a difference in the law. If the plaintiff had a contract with the Pennsylvania Railroad, that company could be made to indemnify the plaintiff in the place where the contract was made. Under such circumstances, there can be no doubt what course was most for the advantage of the owner, or what directions a prudent owner, if present, would give, and the analogies of the law would imply a corresponding authority in the defendant. *Knight v. Providence & Worcester Railroad*, 13 R. I. 572, 576. *Pierce v. Columbian Ins. Co.* 14 Allen, 320, 323.

If the effect of the plaintiff's instructions were doubtful, the

law would give the defendant the benefit of the interpretation adopted by it in good faith, (*Ireland v. Livingston*, L. R. 5 H. L. 395, 416,) and would consider the necessity of an immediate decision. *Hawks v. Locke*, 139 Mass. 205, 209. But the defendant does not need the aid of such considerations. Taking into account what we have said, and also that the defendant had a right to assume that the plaintiff knew that it was not bound by the Pennsylvania Railroad's contract, and therefore knew that a higher rate might be demanded beyond the lines of that road than had been paid, we are of opinion that the defendant was justified in giving preponderance to the requirement of continuous and speedy carriage, and in assuming that the authority of the Pennsylvania Railroad to offer the horses was not conditional upon the prepayment of freight by the plaintiff turning out to be full payment of all that the defendant could demand. See *Wolf v. Hough*, 22 Kansas, 659; *Wells v. Thomas*, 27 Mo. 17; *Vaughan v. Providence & Worcester Railroad*, 13 R. I. 578, 581; *Schneider v. Evans*, 25 Wis. 241, 250, 261, *et seq.*

It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien when the first carrier has forwarded the goods to a wrong place. *Briggs v. Boston & Lowell Railroad*, 6 Allen, 246, distinguishing *Robinson v. Baker*, 5 Cush. 187. *Whitney v. Beckford*, 105 Mass. 267. *Patten v. Union Pacific Railway*, 29 Fed. Rep. 590, disapproving *Fitch v. Newberry*, 1 Doug. (Mich.) 1. *Vaughan v. Providence & Worcester Railroad*, 13 R. I. 578. Yet in that case the last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper.

A subordinate argument was suggested, that the plaintiff was entitled to go to the jury on the allegations of unreasonable delay in transportation and of detention of the horses upon the defendant's cars. But there was no evidence of unreasonable delay by the defendant after the horses were received by it, and the consequences of the detention after arrival are only alleged as matter of aggravation of the alleged wrongful refusal to deliver them. As the refusal was rightful, negligence in the care of the horses while detained, if any there was, cannot be relied

on in this case as a substantive cause of action. It is plain, too, that the case was not tried on the footing of an action for negligence in rightful keeping, and the plaintiff acquiesced in that view of the case, and did not seek to amend. The questions of evidence are not argued by the plaintiff, and are sufficiently answered by the foregoing discussion.

Judgment on the verdict.

W. C. Loring, for the defendant.

S. J. Thomas & C. P. Sampson, for the plaintiff.

MARY B. TRUMBULL vs. GEORGE F. TRUMBULL.

Suffolk, March 11, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Devise — Rule in Shelley's Case — Life Estate — Estate Tail — Statute.

Under the Rev. Sta. c. 59, § 9; (Pub. Sta. c. 126, § 4,) providing that "when lands are given by deed or will to a person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee simple in his heirs," a devise of land to G. B. T. "to have and to hold to him for life and to his lawful issue forever, if he shall die leaving any such issue; but in case he shall decease without leaving such issue" then to others named, "to be equally divided between them, share and share alike, and to their heirs and assigns forever," vested an estate for life only in G. B. T.

WRIT OF DOWER, dated November 2, 1886, by the widow of George B. Trumbull, against his sole heir at law. Trial in the Superior Court, without a jury, before *Barker, J.*, who ruled that the demandant was not entitled to dower in the lands described in the writ, and found for the tenant, and reported the case for the determination of this court, in substance as follows.

Susan Bryant, the former owner of the lands in question, died in 1848, and her will, which was dated March 3, 1847, after providing among other things for the support and education of her "adopted son, George Bryant Trumbull," who was described as the minor child of her sister, Catherine Trumbull, and her sister's husband, James Trumbull, contained the following provision:

"Sixth. I give, devise, and bequeath to my said adopted son, the said George Bryant Trumbull, all the rest and residue of my estate, real and personal and mixed, of which I may die seised or possessed, or in which I may have any right, and wheresoever found, to have and to hold to him for life and to his lawful issue forever, if he shall die leaving any such issue; but in case he shall decease without leaving such issue, then I give, devise, and bequeath all the said rest and residue of my said estate, real, personal, and mixed, to Harriet Trumbull, Julia Trumbull, and Catherine Trumbull, children of James and Catherine Trumbull before named, to be equally divided between them, share and share alike, and to their heirs and assigns forever."

George B. Trumbull, by himself or his tenants, occupied the lands in question, which passed to him under the above clause of the will, from the time when he became of age until he died, on November 1, 1883, intestate, leaving a widow, the demandant, and one child only, the tenant, who was in possession of the lands in question. Harriet, Julia, and Catherine Trumbull, the persons named in the sixth clause of the will, survived the testatrix, and were either living at the death of George B. Trumbull, or had heirs other than him.

If the ruling and finding were correct, judgment was to be entered on the finding for the tenant; otherwise, such judgment was to be entered as justice might require.

T. J. Morrison, for the demandant.

J. O. Teele & J. R. Smith, for the tenant.

DEVENS, J. The question presented by the case at bar is whether George B. Trumbull, the husband of the plaintiff, took a life estate only in the property in which she claims dower, or an estate tail. In the latter case the plaintiff would now be entitled to dower. It would also follow that George B. Trumbull could by deed have alienated the property, so that he could have deprived his issue and the sisters who, in a certain contingency, were entitled to it, of any estate therein.

Whether words importing a failure of issue of him to whom an estate is first given import an indefinite failure of issue, or a definite failure at the death of the first taker, determines what estate has been given to him. It is only when they should receive the former construction that an estate tail is created.

A devise to one, and if he die without heirs of his body then over to another, would create an estate tail in the first taker, whatever the actual intention of the testator might have been; but words qualifying such a devise, and showing that the testator had in mind a definite failure of issue at the decease of the first taker, and made provision for that contingency, would defeat such a construction. *Schmaunz v. Göss*, 132 Mass. 141.

We shall not find it necessary, in the view we take of the statutes of Massachusetts, to determine whether at common law it would be held, on the language of the devise now in question made to George B. Trumbull, that an indefinite failure of issue only was intended, upon which the estate was to go to his sisters so that an estate tail in him was created with remainder to his sisters in fee, or whether a definite failure was intended, upon the occurrence of which the estate given to his sisters was to be substituted for that given to his issue.

The rule in *Shelley's case* was, that when an estate of freehold is limited to a person, and in the same instrument there is a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word "heirs" is to be taken as a word of limitation, or, in other words, the ancestor takes the whole estate comprised in these words; if it be to the heirs of his body, a fee tail; if to his heirs, a fee simple. 1 Co. 93 a. 1 Powell on Devises, 429. The construction given to the words "children" and "issue" is that which is given to the words "heirs of the body." Report of Commissioners on Rev. Sts. c. 59, § 9. This rule was abolished in Massachusetts, so far as devises are concerned, by the St. of 1791, c. 60. In the Revised Statutes this change was extended to conveyances by deed. It was a rule of property, and not of construction, and therefore no declaration, however unequivocal, when an estate was thus created, that the ancestor should have an estate for life only, or that his estate should be subject to all the incidents of a life estate, or that the heirs should take as purchasers, would be operative; the particular intent thus clearly expressed would have been compelled to yield to the general intent expressed by the creation of the estate and the devise be held accordingly. 1 Powell on Devises, 435. *Bowers v. Porter*, 4 Pick. 198.

The provisions of the Rev. Sts. c. 59, § 9, which were in force when the will of Susan Bryant became operative, are the same as those now found in the Pub. Sts. c. 126, § 4, and are as follows: "When lands are given by deed or will to a person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee simple in his heirs." It has been held that this statute was not intended to prohibit or restrain the creation of estates tail by apt and sufficient words, according to well established rules of law, so that when an estate is given *uno flatu* to one and the heirs of his body, either in express terms or by necessary implication, an estate tail is created, and the first grantee or devisee takes no more than an estate for life. *Parker v. Parker*, 5 Met. 184. *Wheatland v. Dodge*, 10 Met. 502. *Hayward v. Howe*, 12 Gray, 49. The statute does apply, however, when the devise is "in express terms or in substance and effect to the first taker for life, and was designed to give effect to the particular intent creating a life estate, to the exclusion of the general intent to create a fee tail, which the rule of the common law implied from a gift so expressed." *Hayward v. Howe*, 12 Gray, 49. *Bowers v. Porter*, 4 Pick. 198. *White v. Woodbury*, 9 Pick. 136. *Putnam v. Gleason*, 99 Mass. 454.

In the case at bar, the devise is not only in express terms to the first taker for life, but the intent of the testator clearly appears to provide for George B. Trumbull's issue, if he should leave issue, and, in the event of his dying without issue, to provide for his sisters. While the word "heirs" is not used in the devise, but "issue," the statute, employing the phrase or "by words to that effect," includes issue as among those who are to take in remainder after the first estate. It does not appear that the devisee for life had issue when the devise became operative. In any event it could not have been determined until his decease whether he would leave issue, nor who would be entitled to take as such. By the death of George B. Trumbull, leaving a son, the son takes an estate in fee at the termination of the life estate of George B., by virtue of the devise to him, as the sisters would have taken the same estate if there had been no issue living at the decease of George B.

The plaintiff further contends, that if the estate of the defendant be held to be one of purchase, as it remained uncertain until the death of the first devisee who would take the remainder until the death occurred, the inheritance of the real property was vested in George B. in common with his sisters (they being the heirs at law of the devisor), and thus that he was seised of a freehold under the devise and of a fourth part of an estate of inheritance, which by possibility might descend to his heirs. But there was no estate left for the heirs at law of Susan Bryant, the devisor, nor any contingency in which as such they could inherit. The sisters took a vested remainder after the life estate, subject to be divested if George B. should die leaving issue. If he left issue, the remainder became that of the issue; if otherwise, it remained to the sisters.

Judgment on the finding.

THOMAS N. FILES *vs.* BOSTON AND ALBANY RAILROAD
COMPANY.

Suffolk. March 12, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Railroad — Passenger — Riding on Freight Locomotive — Custom.

A person who attempts to get into the cab of a locomotive engine attached to a freight train on a railroad used exclusively for the transportation of freight, to ride for his own convenience, by invitation of the conductor of the train, does not acquire the rights of a passenger, and cannot recover for personal injuries occasioned to him by the starting of the engine, even if he has previously ridden thereon by a similar invitation, and has seen others, including railroad employees, do so.

TORT for personal injuries received by the plaintiff in attempting to get upon a locomotive engine belonging to the defendant. Trial in the Superior Court, before *Hammond*, J., who ordered a verdict for the defendant, and reported the case for the determination of this court. If the ruling was erroneous, the verdict was to be set aside; otherwise, judgment was to be entered on the verdict. The facts appear in the opinion.

B. Hall & J. F. Cronan, for the plaintiff.

Samuel Hoar, for the defendant.

DEVENS, J. The plaintiff, by invitation of the defendant's conductor of a freight train upon a railroad belonging to the defendant and used entirely for the transportation of freight, was getting upon the locomotive engine attached to the train in order to ride in the cab thereof, when the engine started, causing him to fall off and occasioning to him injuries, to recover damages for which he brings this suit. He had been to the office of the defendant's freight agent to order cars for the use of the firm of which he was the shipping clerk. He had at some previous times ridden back on the engine to his employer's yard, and it was sometimes necessary for him to direct where the freight cars ordered should be placed in the yard on their arrival, but there was no evidence that there was any such necessity at the time of the accident. The plaintiff also testified that he had seen others, including the local freight agent and a conductor, ride on the engine at various times.

Upon this evidence, the plaintiff contends that a usage was shown to carry back in the cab of the locomotive engine from the local freight office to his place of business the messenger ordering freight cars, when such cars were sent at once, and that the defendant is thus responsible for the carelessness of its engineer or conductor in starting the locomotive engine before he had fairly got upon it, even if the plaintiff was not to pay any fare. It may be conceded that, if the defendant had permitted the plaintiff to acquire the rights of a passenger, it would not be important that he was not to pay any fare. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18. There was no evidence of any malicious act or gross negligence on the part of the defendant's servants, and the question presented by the case is whether one who attempts to get on board a locomotive engine attached to a freight train on a railroad devoted exclusively to the transportation of freight, by invitation of the conductor, acquires the rights of a passenger, even if he has previously ridden on the locomotive by a similar invitation, and has seen other servants of the corporation do so. The defendant's railroad might properly be held responsible for acts done by the freight conductor in the line of his duty, perhaps also for acts done by

him in the apparent line of the duty intrusted to him, if such as one dealing with him would be authorized to treat as done by authority of the company.

If a person takes an exposed position upon a train not designed for the use of passengers, he himself incurs the special risks of that position, whether he takes it by the license, non-interference, or even express permission of the conductor. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. *Bates v. Old Colony Railroad*, 147 Mass. 255. *Torrey v. Boston & Albany Railroad*, 147 Mass. 412.

In the case at bar, the conductor had no general authority, so far as shown, to take passengers on the locomotive engine, or any special authority to take the plaintiff. The conductor was not only in charge of a freight train, but on a road intended solely for the transportation of freight. The locomotive engine was obviously not intended for passengers, and he had in his charge no vehicle, nor any part of a vehicle, in any way adapted for passengers. In riding for his own convenience in a place where it was not safe or prudent to ride, the plaintiff took on himself the risks of so doing, whether he did so by the license or on the invitation of the conductor. It was not within the apparent scope of the freight conductor's authority to permit persons to ride on his freight train, far less on the locomotive engine thereof; nor can the fact that he had allowed the plaintiff to do so at a previous time, and also that the local freight agent and a conductor were known by the plaintiff to have ridden on the locomotive engine, make the defendant responsible for accidents which occurred thereby. *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429. *Merrill v. Eastern Railroad*, 139 Mass. 238.

Judgment on the verdict.

EDWINA M. SPICER vs. LYNN AND BOSTON RAILROAD
COMPANY.

Suffolk. March 13, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Declaration — Demurrer — Surplusage — Proximate Cause.

A declaration against a street railway company alleged in one count that the plaintiff, a woman, took passage in one of its cars for B., the terminus of the line, and paid her fare; that while the car was on its way she was ordered to leave it, and afterwards forcibly expelled; and that, in consequence of the expulsion together with the defendant's neglect of duty in not carrying her to B., and of her walk thereto in order to reach her home, she was injured; and in another count, after reciting the same facts, further alleged that, after her expulsion from the car, the plaintiff "walked to B., her home, there being no other way or means of reaching B.," and that she was injured by the expulsion, by the neglect to carry her, and by the walk. Due care on the plaintiff's part was alleged in each count. *Held*, on demurrer, that the plaintiff under the first count could recover for injuries resulting from her expulsion, and that under the second count she might recover, not only for such injuries, but for those resulting from her walk to B., if that was the natural and probable consequence of the defendant's act.

TORT. The second count of the declaration, which was amended by striking out the first count, was as follows: "And the plaintiff says the defendant is a corporation owning and operating a railroad from Lynn to Boston, and particularly from Revere Beach, so called, to Boston, and is a common carrier of passengers between said places by means of street railway cars drawn by horses over defendant's railroad; that on the thirty-first day of July, A. D. 1887, on or about that date, at the request of defendant, she took a seat in one of defendant's cars for the purpose of being carried to Boston from a place at or near Revere Beach so called, and paid the fare fixed by defendant to defendant's servant and agent in charge of said car. After proceeding some distance toward Boston, defendant's servant and agent in charge of said car required and compelled plaintiff to get out of said car, and directed her to take another car for Boston, which the plaintiff did do; and after proceeding a short distance farther toward Boston, defendant's agent and servant in charge of said car caused it to be stopped, and

neglected and refused to allow plaintiff to ride in said car. The defendant, its agent and servant, ordered plaintiff to leave said car, and forcibly expelled her therefrom, contrary to the duty of the defendant. In consequence of her wrongful expulsion from defendant's car, the defendant's neglect of duty in not carrying her to Boston, as it was the duty of the defendant to do, and of her walk to Boston in order to reach her home, she was made severely ill for a long time, and suffered great bodily pain and anguish of mind, to her great damage. The plaintiff avers that she was at all times in the exercise of due care."

The third count of the declaration was as follows: "The plaintiff says the defendant is a corporation owning and operating a railroad by means of street railway cars, drawn by horses over defendant's railroad, between Boston, Revere Beach, so called, and Lynn, in the Commonwealth of Massachusetts, and is a common carrier of passengers between said places. On or about the thirty-first day of July, A. D. 1887, the plaintiff, at the request of defendant, entered one of defendant's cars then about starting for Boston, to which place she was intending to proceed, and paid the regular fare established by defendant to Boston, to defendant's agent and servant in charge of said car; whereby plaintiff became a passenger entitled to be conveyed to Boston, and it became the duty of defendant to convey plaintiff to Boston. But defendant, its agents and servants, being wholly regardless of their duty in the matter, refused, without cause, to carry plaintiff, and wrongly compelled plaintiff to leave said car, and refused to permit plaintiff to ride upon its cars to Boston, although requested by plaintiff so to do. The plaintiff walked to Boston, her home, there being no other way or means of reaching Boston, all which was well known to the defendant, its agents and servants. In consequence of defendant's refusal to convey plaintiff, and of her walk home to Boston, and her being compelled to leave defendant's cars, she was made severely ill, and has sustained severe injuries, and has suffered great bodily pain and anguish of mind, to her great damage. The plaintiff avers that during all the time she was in the exercise of due care."

The defendant demurred to each count, "because it therein appears that the alleged damage to the plaintiff was occasioned

by reason of her walking to Boston, and not by the sole act or neglect of the defendant."

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

C. R. Elder, for the plaintiff.

T. P. Proctor & E. Tappan, (*B. W. Warren* with them,) for the defendant.

DEVENS, J. The second count of the plaintiff's declaration in tort (the first having been withdrawn) alleges that the plaintiff took passage in the car of the defendant, a common carrier of passengers from Revere to Boston, paying her fare to the defendant's servant, who was in charge; that when the car had proceeded some distance towards Boston she was directed to change into another car, which she did, and that thereafter, while on the way towards Boston, she was ordered by the defendant's servant to leave said car, and was forcibly expelled therefrom. She alleges that, "in consequence of her wrongful expulsion from defendant's car, the defendant's neglect of duty in not carrying her to Boston, as it was the duty of the defendant to do, and of her walk to Boston in order to reach her home, she was made severely ill for a long time, and suffered great bodily pain and anguish of mind, to her great damage." It may be inferred, perhaps, from this, that the plaintiff did walk to Boston, but there is no distinct allegation that she did so, or that she was subjected to any such inconvenience as required her to do so.

It is the contention of the defendant, that two causes of injury to the plaintiff are thus set forth, one the act of the defendant, one that of the plaintiff herself, not alleged to have been caused or rendered necessary by any act of the defendant, and that from these combined but distinct causes the injury to the plaintiff resulted; and that it is therefore not alleged to have been occasioned by the defendant's act alone. Under this count the plaintiff cannot recover for any damage occasioned by her walking, or the necessity, if any, that she was under to do so; but the allegation that she was wrongfully and forcibly expelled from the car is a clear averment of a tortious act by the defendant, for the consequences of which it is responsible, and the count may be

treated as if the allegation as to the walking were omitted, leaving the plaintiff to recover upon this count for such damage as she shall show proceeded from her expulsion. When several acts done to a plaintiff are combined in an allegation as causing him injury, some of which the plaintiff may fail to prove, or for some of which the defendant may not be responsible, it would be construing a declaration too narrowly to hold that unless all were proved there could be no recovery.

In the case at bar, the question we have been discussing is of little importance, as the third count distinctly alleges not only that the plaintiff was wrongfully compelled to leave the defendant's car, but that the plaintiff, after being compelled to leave the defendant's car, "walked to Boston, her home, there being no other way or means of reaching Boston"; and it alleges injury to her to have been occasioned by the defendant's refusal to convey the plaintiff, by her being compelled to leave the defendant's car, and by her walk to Boston. This sufficiently alleges that her walk to Boston was occasioned by the act of the defendant in compelling her to leave the defendant's car, and under this count she may recover for the damages occasioned not only by her expulsion from the car, but also by her walk to Boston, if she shall show that this was the natural and probable consequence of the defendant's act, she herself not being negligent, but, as she avers, in the exercise of due care.

That a person entitled to be carried to his destination, if set down at a wrong place, or if removed from the car in which he was being transported before the termination of the journey, would be put to serious inconvenience, and would be obliged to extricate himself therefrom, is to be anticipated. The wrongdoer is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as according to common experience are likely to result. Nor is he exonerated from liability by the fact that intervening events or agencies contribute to the injury. *Derry v. Flitner*, 118 Mass. 181. The fact that injury to the plaintiff is immediately caused by her own act in walking would not relieve the defendant from liability, or make the injury one that did not directly result therefrom, if such walk was practically necessary, and if the plaintiff was guilty of no want of due care in undertaking it.

Whether the plaintiff may recover for the injury to her health arising from her walk, or from that in connection with her physical condition at the time, or whether one under similar circumstances is to be limited strictly to the inconvenience sustained, the time lost, and the expenditures incurred, have been questions much considered. We do not think it advisable to discuss them in an inquiry which brings before us only the sufficiency of the plaintiff's declaration. *Demurrer overruled.*

MICHAEL M. TRECY & another vs. LUMAN T. JEFTS.

Suffolk. March 14, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Money paid by Mistake — Fraud — Agreement of Compromise.

A creditor with others signed an agreement giving his debtor time, with an option to settle for fifty per cent, and the debtor, who mistakenly supposed he owed him twice as much as he did, purporting and intending, as the creditor understood, to pay one half the debt, paid the whole amount to the creditor, who knew the mistake, but did not mention it to the debtor. *Held*, that the debtor could recover back one half of the amount paid by him.

HOLMES, J. This is an action to recover money paid by mistake. The verdict was for the plaintiffs. There was evidence tending to show the following facts. The plaintiffs were in trouble, and many of their creditors had signed a paper giving time, with an option to settle for fifty per cent. The plaintiffs owed the defendant \$1,014.80, but by a mistake supposed that they owed \$2,029.60, twice as much. The defendant knew the mistake, but did not mention it to the plaintiffs. The defendant signed the paper by an agent, and the plaintiffs, purporting and intending to pay one half of their debt, as the defendant understood, paid him the whole amount. If the facts were found to be as above stated, they showed a case of fraud, within the principle of *O'Donnell v. Clinton*, 145 Mass. 461.

The money thus obtained by fraud was not payable presently, for the credit given on a considerable part of the items had not

expired. If the transaction had been what it purported to be, the plaintiffs would have been freed from all liability by payment of one half of what they owed. *Brooks v. White*, 2 Met. 283, 287. *Bowker v. Childs*, 3 Allen, 484, 486. *Hunt v. Brown*, 146 Mass. 253, 254. Whether or not on that ground alone the plaintiffs could have held the defendant to admitting that their debt was satisfied by payment of one half of what was actually due, it would seem that they might have sued on the ground that the defendant had no right to that particular money, and that they would not have parted with it but for his fraud. *Commonwealth v. Donahue*, 148 Mass. 529. But however this may be, so far as appears, the agreement of compromise was binding within the principle of the Massachusetts cases. *Far-ington v. Hodgdon*, 119 Mass. 453, 457.

Exceptions overruled.

C. H. Welch, for the defendant.

H. G. Nichols, for the plaintiffs.

JOHN S. HOBBS & others vs. ROBERT F. STRAINE.

Suffolk. March 15, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Promissory Note — Indorser — Notice — Waiver.

At the trial of an action against the indorser of a promissory note, there was evidence tending to show that the holder, in due time, took a written notice of the dishonor addressed to the defendant to his office, which was his place of business, and, finding no one in, left it there, but the precise place in the office where it was left was not fixed with certainty. The judge instructed the jury, that, if they found that it was left in a conspicuous place in the office, it was a sufficient notice. *Held*, that the defendant had no ground of exception.

Evidence was also introduced at the trial tending to show that after the note matured the defendant promised to pay, he testifying that, at the time of the alleged promise, he knew that he was released from liability on account of his failure to receive notice, and the judge instructed the jury, that, "if the defendant, knowing all the facts which released him from liability, and knowing or believing himself to be discharged from liability as indorser, promised to pay the note, they would be warranted in finding for the plaintiffs." *Held*, that the instruction was sufficiently favorable to the defendant.

CONTRACT upon a promissory note, made by one Eldridge, payable to the order of the defendant, and indorsed by him to the plaintiffs. Trial in the Superior Court, before *Dunbar, J.*, who, after a verdict for the plaintiffs, allowed a bill of exceptions, which, so far as material, appears in the opinion.

W. M. Stockbridge, for the defendant.

S. L. Whipple, for the plaintiffs.

MORTON, C. J. Notice of the dishonor of a note is sufficient to charge an indorser if it is delivered to him personally, or is left at his place of residence or of business, or is deposited in the mail addressed to him at his place of residence or of business, the postage being prepaid. Pub. Sts. c. 77, § 16. *Bank of America v. Shaw*, 142 Mass. 290. *Importers & Traders' National Bank v. Shaw*, 144 Mass. 421. The underlying principle of all the decisions upon the subject is, that reasonable diligence must be used by the holder in getting notice of the dishonor to the indorser.

In the case at bar, the evidence tended to show that the plaintiffs, in due time, took a written notice of the dishonor, addressed to the defendant, to his office, which was his place of business, and, finding no one in, left it there. The precise place in the office where it was left was not fixed with certainty, and the court instructed the jury, that, if they found that it was left in a conspicuous place in the office, it was a sufficient notice. This ruling was correct. The jury might well find that the notice was left in good faith in the defendant's office, in such way that he would be likely to see it when he came in. Such a mode of giving the notice would ordinarily be as effectual as if it were sent by mail through a letter carrier. We think the evidence shows a compliance with the rule of law requiring the holder to exercise reasonable diligence, and that the notice was sufficient to charge the defendant as indorser.

There being conflicting evidence as to the sufficiency of the notice, the plaintiffs at the trial relied upon a waiver by the defendant of any defect in the notice, and introduced evidence tending to show that after the note matured the defendant promised to pay it, he testifying that, at the time of the alleged promise, he knew that he was released from liability on account of his failure to receive notice. This was evidence of a waiver,

and the instruction of the court to the jury, that, "if the defendant, knowing all the facts which released him from liability, and knowing or believing himself to be discharged from liability as indorser, promised to pay the note, they would be warranted in finding for the plaintiffs," was sufficiently favorable to the defendant. *Third National Bank v. Ashworth*, 105 Mass. 508. *Rindge v. Kimball*, 124 Mass. 209. *Exceptions overruled.*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY *vs.*
WORCESTER, NASHUA, AND ROCHESTER RAILROAD COM-
PANY.

Suffolk. March 15, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Railroad Consolidation — Liability of New Corporation — Statute.

A railroad under lease issued bonds, guaranteed by the lessor, which provided that the holders might convert them into shares of stock of the lessee at par at any time after the completion of its road,—all by the express authority of special statute. After the road was completed, the lessor and lessee united, under a statute which provided that "the corporation so established shall . . . be subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject," and that "all claims and contracts . . . against either corporation may be enforced by suit or action, to be commenced and prosecuted . . . against the corporation to be established under this act." After the consolidation, a holder of such bonds, to whom interest accruing thereon was paid by the new corporation, made a demand upon it for shares of stock as provided therein, but agreed to accept in satisfaction of his demand shares of stock in the new corporation, and the demand was refused. *Held*, that such bondholder might recover from the new corporation the damages occasioned to him by such refusal, and that his acceptance of interest was immaterial.

CONTRACT to recover damages for the non-issue of shares of stock in exchange for bonds. Writ dated April 14, 1887. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, which so far as material is as follows.

The Nashua and Rochester Railroad Company, a New Hampshire corporation, in 1872, prior to its construction, was leased for fifty years to the Worcester and Nashua Railroad Company,

a corporation duly organized under the laws of that State and of this Commonwealth. The Nashua and Rochester Railroad Company subsequently issued bonds, dated April 1, 1874, to the amount of seven hundred thousand dollars, as authorized by a statute of New Hampshire (St. N. H. 1873, c. 139), which was approved on July 3, 1873, and provided, in § 2, that "bonds issued under authority of this act may be converted into shares of the capital stock of the corporation at the par value of one hundred dollars each, at the option of the holder, at any time after the completion of the road"; and in § 3, "The Worcester and Nashua Railroad Company shall indorse the said bonds, or otherwise guarantee the payment thereof, and the interest thereon." The plaintiff became the owner and holder of twenty-five of these bonds, each of which was of the denomination of one thousand dollars, and subsequently the Worcester and Nashua Railroad Company not only guaranteed the bonds so issued, but agreed to pay directly to the holders of them the six per cent interest due thereon.

By another statute of New Hampshire (St. N. H. 1879, c. 125), which was approved on July 1, 1879, the holders of the bonds were authorized "to surrender any or all of said bonds, and receive in lieu thereof new bonds of the same date and to the same amount; and said mortgage shall be security for said new bonds in the same way and manner, and to the same extent, as it was for the bonds surrendered."

The plaintiff, on September 30, 1879, under the provisions of this statute, surrendered its twenty-five six per cent bonds, and received in exchange therefor the bonds in question, which carried interest at five per cent, and were substantially the same in all particulars as the six per cent bonds, except that they recite the facts that they were issued in exchange for them, and that they have the additional security of a mortgage on the Worcester and Nashua Railroad. Both the original bonds and the substituted bonds contained the following language: "The holder of this bond may convert the same into shares of the capital stock of the corporation at the par value of one hundred dollars each, at the option of the holders, at any time after the completion of the road, upon the surrender of said bond at the office of the treasurer of the corporation."

A further statute of New Hampshire (St. N. H. 1875, c. 128), which was approved on July 3, 1875, authorized the Worcester and Nashua Railroad Company to purchase and hold, or have held for its benefit, bonds or shares of the capital stock of the Nashua and Rochester Railroad Company, and also provided, in § 1, that "any shares of the capital stock of the Nashua and Rochester Railroad shall be exchanged at par for said bonds by the Worcester and Nashua Railroad Company upon presentation."

In 1883, before which time the road of the Nashua and Rochester Railroad was completed, the Worcester and Nashua Railroad Company and the Nashua and Rochester Railroad Company were authorized to unite by another statute of New Hampshire (St. N. H. 1883, c. 239), which contained the following provisions:

"Section 1. The Worcester and Nashua Railroad Company, and the Nashua and Rochester Railroad, corporations incorporated by the Legislatures of the States of New Hampshire and Massachusetts, are hereby authorized, at any time within six years from the passage of this act, to unite said corporations upon conditions that the holders of shares of the capital stock in either of said corporations may, upon surrender of such shares, receive in lieu thereof certificates for an equal number of shares in the corporation to be established under this act, and upon such other equal terms for each such share as may be mutually agreed upon, subject to the provisions of this act, by the written assent, or by vote of a majority in interest of the stockholders of each of said corporations, at meetings duly called for that purpose; and such written assent or votes so passed by said corporations respectively shall be effectual to unite said corporations, within the intent and meaning of this act; and the corporation so established shall have all the powers and privileges, and be subject to all the duties and liabilities, set forth in the Public Statutes, and in all general laws that now are or may hereafter be in force relating to railroad corporations.

"Section 2. If such union takes place as is provided for in this act, the corporation so established shall have, hold, and possess all the powers, privileges, rights, franchises, property, claims, and demands which, at the time of such union, may be held and enjoyed by the said existing corporations, and be

subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject; and all suits at law or in equity, and all proceedings before any tribunal which may be pending, to which either corporation is a party, may be prosecuted and defended by the corporation hereby authorized to be established, in the same manner, and with the same effect, as might have been done had such union not been formed. All claims and contracts, and rights and causes of action at law or in equity, of or against either corporation, may be enforced by suit or action, to be commenced and prosecuted by or against the corporation to be established under this act as aforesaid. . . .

“Section 4. After the organization of the corporation established under this act, each of the said existing corporations shall continue for the purpose of perfecting the said union, and doing all such acts and things, if any, as may be necessary therefor, and shall execute all such transfers, assignments, and conveyances as the corporation established under this act may deem necessary or expedient to cause to vest in itself any property, estates, contracts, rights, or claims, if any there be, which do not vest in it by authority of this act.”

The St. of 1888, c. 129, of this Commonwealth, was of like tenor with the statute of New Hampshire of 1888.

The stockholders of both corporations duly accepted these statutes, and in accordance with the provisions thereof united and formed one corporation, under an agreement in writing, which contained the following:

“On and after the first day of December, 1883, said corporations shall be united and consolidated, and shall thereafter form one corporation, to be known as and called the Worcester, Nashua, and Rochester Railroad Company; and that on and after said first day of December, A. D. 1883, each holder of stock in either of said corporations shall be and become a stockholder of the same number of shares in the consolidated company, and may at any time surrender his certificate of stock, and the same shall be cancelled and he shall receive in lieu thereof a certificate of the same number of shares in said consolidated company, which shares shall be in every respect of equal value, and entitled to the same dividends; and we do

further agree, for the purpose of equalizing said shares, that a dividend, computed at the rate of three per cent per annum, shall be paid to the holders of stock in either of said corporations from the dates of the last dividends declared to the time said union takes place. Now, therefore, we, the undersigned stockholders in the Worcester and Nashua Railroad Company and the Nashua and Rochester Railroad, or in either of said corporations, being the owners of the number of shares of the capital stock in said corporations set against our names respectively, do hereby make and execute our written assent to the union and consolidation of the said Worcester and Nashua Railroad Company and the Nashua and Rochester Railroad, upon the terms and conditions above named, so as to form one corporation, to be called the Worcester, Nashua, and Rochester Railroad Company, and we do hereby assent to and adopt the provisions of the aforementioned act authorizing such union."

At the time the two corporations were consolidated the Worcester and Nashua Railroad Company held more than enough of the shares of stock of the Nashua and Rochester Railroad Company to satisfy the plaintiff's demand, and after the consolidation the interest upon the plaintiff's bonds was paid by the new corporation until October 1, 1886, including the coupons then payable. On March 3, 1887, the plaintiff surrendered its bonds, and tendered them to the defendant's treasurer, and demanded in exchange therefor two hundred and fifty shares of the stock of the Nashua and Rochester Railroad Company at par, by a demand in writing, which recited that "as said corporation has been consolidated with the Worcester and Nashua Railroad Company by authority of the Legislature, under the name of the Worcester, Nashua, and Rochester Railroad Company, two hundred and fifty shares of the capital stock of the latter corporation will be accepted in full satisfaction of this demand." This demand was refused by the defendant.

If upon these facts the plaintiff was entitled to recover, judgment was to be entered for it for the difference between the market value of its bonds on March 3, 1887, and that of two hundred and fifty shares of stock of the defendant corporation, or \$8,250, with interest; otherwise, judgment was to be entered for the defendant.

G. O. Shattuck & F. L. Hayes, for the plaintiff.

R. Olney, for the defendant.

HOLMES, J. The plaintiff is the holder of bonds which were issued by the Nashua and Rochester Railroad, and guaranteed by the Worcester and Nashua Railroad, and which gave the holder the right to convert them into stock of the former corporation, at par, at any time after the completion of its road, — all by express authority of special statute. The road has been completed, and since then the two railroad corporations have been consolidated under a statute authorizing it. The statute subjects the new corporation to all the contracts of the old, in terms to be stated. The plaintiff has made a demand upon the new corporation, which has been refused, and the question is, whether it can recover damages for the refusal, or whether its right to convert the bonds into stock was ended, or at least limited in point of time by the consolidation.

It is argued that the contract to exchange stock for bonds depended on the continued existence of the contracting corporation, the stock of which was to be delivered, and that the bonds cannot be taken to have bound the Nashua and Rochester Railroad to continue in existence. We have no occasion to controvert these or any other general propositions advanced for the defendant. Neither do we lay down any general proposition in deciding for the plaintiff. We deal only with this particular consolidation.

When these bonds were issued, the obligor's road was under a long lease to the Worcester and Nashua Railroad. The latter was required by statute to guarantee the bonds. It paid the interest directly to the bondholders, and after a time it mortgaged its road as a further security. Soon after the bonds were issued, the Worcester and Nashua road was authorized to buy the bonds and stock of the Nashua and Rochester Railroad, with a proviso requiring the former to exchange the stock of the latter for its bonds on presentation.

Subsequently the consolidation was authorized, and was carried through. The parties in uniting may not have dealt on a footing of perfect equality, as a dividend of three per cent per annum was paid the stockholders in the old corporations from the dates of the last dividends declared to the time of the union.

The dates of the last dividends declared by the two corporations are said to have been different. But the Legislature contemplated equality. It dealt with the shares in both of the old corporations as exactly equal to the shares in the new. These were to be exchanged share for share, and "upon such other equal terms for each such share as may be mutually agreed upon." Under such circumstances the addition of the franchise of another corporation to that of the obligor was represented by a determinate number of shares in the new corporation, that is to say, by a number equal to the number of shares in the corporation thus united to the obligor. In substance, the case is not different from what it would have been if the Nashua and Worcester Railroad had been authorized to issue the same amount of full paid stock, and to build an extension of its road over what was actually the Worcester and Nashua Railroad, and then to change its name.

It is usual for consolidating statutes to introduce more or less of the element of succession, or continuity of legal person as to existing rights and duties, notwithstanding the fact that in other respects the old and new corporations are not the same; e. g. *Boston & Providence Railroad v. Midland Railroad*, 1 Gray, 840, 859; *Abbott v. New York & New England Railroad*, 145 Mass. 450, 458; *Pullman's Palace Car Co. v. Missouri Pacific Railway*, 115 U. S. 587. It is for the Legislature to say how far the new corporation shall be, as it were, the heir, executor, or continuer of the old. In the case at bar, we have to take into account the intimate connection of the two corporations with each other and with these bonds, the knowledge which the Legislature must be presumed to have had, the terms of the consolidation, and the very strong provisions on the question before us.

The act reads: "The corporation so established shall . . . be subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject." And "all claims and contracts . . . against either corporation may be enforced by suit or action, to be commenced and prosecuted . . . against the corporation to be established under this act." We are of opinion that these words are too strong for the defendant's argument, and that, whether

the plaintiff was entitled to demand shares in the new company or not, it was entitled to hold the defendant to its predecessor's contract. When the defendant failed to deliver stock, either in the new company or the old, on demand, it became liable to the damages agreed as of that date. As in our view the plaintiff's right to demand stock was unabridged by the consolidation, its acceptance of interest from the new corporation had no more effect than acceptance of it from the old one. It had a right to make its election when it chose.

Judgment for the plaintiff affirmed.

R. H. BARHAM vs. JOSEPH B. GOMEZ & another.

Suffolk. March 19, 1889. — May 10, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Poor Debtor — Recognizance — Examination — Adjournment.

The examination of a poor debtor, who had duly recognized, commenced on April 27, and the debtor and creditor during a temporary absence of the magistrate agreed in writing for a continuance of sixty days, which would carry the meeting to Sunday, June 26, and went away, leaving the agreement upon the magistrate's desk. The magistrate upon his return entered upon his docket, "Cont'd 60 days, to June 26, 10 A. M." On Saturday, June 25, after timely notice to both parties that the adjournment was till that day, the debtor duly appeared, and was discharged. *Held*, that there was no breach of the recognizance.

CONTRACT upon a poor debtor's recognizance, entered into by the first named defendant as principal and by the other defendant as surety, and conditioned among other things that Gomez, who was duly arrested on execution on March 24, 1887, should within thirty days from the day of his arrest duly deliver himself up for examination before some competent magistrate. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, on an agreed statement of facts, the substance of which appears in the opinion.

F. M. Copeland, for the plaintiff.

B. Hall, for the defendants.

MORTON, C. J. Upon the facts of this case, there was no breach of the recognizance. The creditor, having received due

notice, was present at the place appointed for the examination of the debtor on April 27, 1887, and the examination was commenced. The magistrate during the hearing went away on business. During his temporary absence the creditor and the debtor agreed in writing that the case might be continued for sixty days, left the agreement upon the magistrate's desk, and went away. This departure of the debtor was with the consent of the creditor, was subsequently assented to by the magistrate, and the creditor cannot, without dishonesty, insist upon it as a breach of the recognizance. Upon the magistrate's return he entered upon his docket the following: "Cont'd 60 days, to June 25, 10 A. M." A continuance for sixty days would carry the meeting to June 26, which was Sunday. There is a discrepancy in the entry, but we think that the precise and definite specification of the time of the adjourned meeting, "June 25, 10 A. M.," must control the misdescription of it as being sixty days after the entry was made, and that there is a sufficient record of an adjournment to that day.

It is plain that the magistrate intended to fix that day, and he alone had the right to make the adjournment. The parties had no right to fix the day of the adjourned hearing, and their agreement on a day is not material, except that it estops the creditor from claiming that their departure put an end to the proceedings, and ousted the magistrate of his jurisdiction. In returning and finding the agreement of the parties, it would have been unjust for the magistrate to take no action, and thus, against the intention of the parties, to expose the debtor and his sureties to the penalties of a breach of the recognizance; he had the right to adjourn to a future day, and therefore his adjournment to June 25 was legal. Both parties by the use of proper diligence could have ascertained the day fixed by him for the future hearing. In fact, both parties had timely notice of it. The creditor had the opportunity to appear and continue his examination of the debtor, but chose to rely upon what he considered a technical breach of the recognizance. The debtor duly appeared, and was discharged. This was all his recognizance required him to do.

Judgment for the defendants affirmed.

INHABITANTS OF CUMMINGTON vs. INHABITANTS OF
BELCHERTOWN.

Hampshire. September 18, 1888. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.*Nullity of Marriage — Fraud — Decree in another State — Jurisdiction —
Insane Pauper — Settlement.*

A married woman, who had been insane prior to her marriage but had recovered and was sane and competent to contract at that time, became incurably insane, and was duly committed as a pauper to a lunatic hospital. Subsequently the husband removed to another State, and there procured a decree annulling the marriage, on the ground of fraud in concealing from him the fact of her prior insanity. Notice of the proceedings there were served upon her at the hospital, but she was not in any way represented therein. *Held*, that such decree was insufficient to annul the marriage here, and could not affect a settlement derived by her from the marriage.

CONTRACT to recover expenses incurred by the plaintiff for the support of an insane pauper in a lunatic hospital. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who ruled that the action could not be maintained, and found for the defendant; and the plaintiff alleged exceptions. If the ruling was correct, it was agreed that judgment was to be entered for the defendant; otherwise, for the plaintiff for the sum declared for, with interest.

The case was argued at the bar for the plaintiff, and submitted on a brief for the defendant, in September, 1888, and afterwards was submitted on the briefs to all the judges. The material facts appear in the opinion.

W. G. Bassett, for the plaintiff.

E. H. Lathrop, for the defendant.

DEVENS, J. Mrs. Angie L. Richards, the expenses of whose support as an insane pauper are here in controversy, had, as Angie L. Root, a legal settlement in the defendant town at the time of her marriage. She acquired one in the plaintiff town by her marriage, on June 10, 1873, with Charles A. Richards, who was there settled. *Milford v. Worcester*, 7 Mass. 48. It is the contention of the plaintiff, that, the marriage of the pauper

having been legally annulled as having been procured by fraud, her settlement in Cummington thus gained is destroyed, and that in Belchertown is revived, it having been suspended only during the *de facto* existence of the marriage.

It was held in *Dalton v. Bernardston*, 9 Mass. 201, that a woman acquiring a settlement by her marriage under the St. of 1793, c. 34, (Pub. Sts. c. 83, § 1, cl. 1,) did not lose her settlement by a divorce, except for a cause which would show the marriage to have been void. In the latter case, there would have been no such marriage as the statute intended as the means of acquiring a settlement. Assuming that the law would be the same where a marriage not originally void, but voidable on the ground of fraud, or for any other reason, was declared void, we consider the question whether the plaintiff has shown any sufficient evidence of a decree annulling the marriage by which the defendant or others collaterally affected by the marriage or the dissolution of it would be bound. If the pauper herself would not be bound by such a decree, it is quite clear that the defendant would not be, whether the marriage was absolutely void or voidable only. Not being a party to the decree, and unable, therefore, to take any steps to reverse it, the defendant is not precluded from showing in a collateral proceeding that the decree was erroneous, or that it has no effect such as the plaintiff claims for it. The plaintiff contends that a decree valid as against the pauper, by which her marriage with Richards has been annulled, has been rendered by the Supreme Court of New York, having jurisdiction both of the subject matter and of the parties.

It appeared that Richards and his wife lived together in this State for about a year and three months, when, in October, 1874, Mrs. Richards was adjudged insane, and legally committed to the lunatic hospital in Northampton, where she remained, with the exception of short intervals of time during which she was in the custody of her parents, until September 20, 1877, when she was again and finally committed to the hospital, and has remained, and now remains, hopelessly insane. Richards never cohabited with her after her first committal to the hospital; and at some time thereafter, but at what time does not appear, removed to the State of New York, without, however, any purpose

of there obtaining a divorce, and without then having it in mind. On November 14, 1881, Richards, having only a short time before been informed for the first time that his wife had been insane before their marriage, commenced a proceeding in New York to have the marriage annulled, on the ground that he was induced to enter into it by fraud, and, after a notice to Mrs. Richards by a summons served upon her while an inmate of the Northampton Hospital, a decree annulling the marriage on the ground that the consent of Richards to the marriage was obtained by fraud was rendered on March 30, 1882. A "transcript of the doings and record of, and testimony in, the Supreme Court, County of Fulton, State of New York," was used at the trial in the Superior Court, and the decree there rendered was relied on by the plaintiff as establishing the fact of a legal dissolution of the marriage, by which the rights of the plaintiff and of the defendant would be affected in this Commonwealth.

While by the Constitution of the United States, Art. 4, § 1, full faith and credit are to be given to the judgments of other States, the jurisdiction of the courts rendering them is open to inquiry, both as regards the subject matter of the controversy and the parties thereto. The recitals of the record are not conclusive evidence, and a party, or one affected collaterally by the judgment, may show that the court had no jurisdiction over the party such as it assumed to exercise. Mrs. Richards was, when the proceedings were commenced and concluded, an utterly insane woman. This not only appears by the finding of the Superior Court, but by all the proceedings of the New York court. It is averred in the petition addressed to it, and the allegations of the petition are found by the referee to whom the inquiries of fact were referred, and by that court, to have been true. It appears also by the return of the summons, and most clearly by the evidence taken before the referee. At no time did she, or any one on her behalf, appear before the referee or the court. Yet no guardian, next friend, or other person was appointed to represent her, and a decree annulling her marriage was rendered against a person whom the record and evidence showed to be insane, and whose rights were wholly unprotected. She had no actual residence in New York at any time. Her husband had abandoned her here on account of her insanity some time before

he went to New York, had made no provision for her support, and she had always resided in this State, which was her domicile of origin.

That a decree of divorce rendered under similar circumstances of residence and condition of the wife in another State would not be recognized in the State of New York, or allowed in any way, directly or indirectly, there to affect any rights, whether of person or property, of the party against whom it had been made, appears clearly from its decisions. *People v. Baker*, 76 N. Y. 78. *Jones v. Jones*, 108 N. Y. 415. We shall not have occasion to consider what would be the effect that should be given here to a decree of divorce, under the circumstances above stated, if such had been rendered by the New York court. Such a decree necessarily implies the original existence of a lawful marriage. A decree annulling a marriage upon the ground that it was contracted under such circumstances that the party petitioning has a right to have it so annulled, stands upon quite different grounds. The validity of a marriage depends upon the question whether it was valid where it was contracted. To this rule there are but two exceptions: marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, and those marriages which the Legislature of the Commonwealth has declared shall not be valid because contrary to the policy of our own laws. *Commonwealth v. Lane*, 113 Mass. 458. Even when parties had gone from this Commonwealth into another State with intent of evading our own laws, and had there married, it was held reluctantly, in the absence of a statute declaring marriage solemnized there with such intent to be void here, that their validity must be recognized. *Medway v. Needham*, 16 Mass. 157. *Putnam v. Putnam*, 8 Pick. 433.

Without discussing the failure to appoint a guardian, the service in the case at bar on Mrs. Richards can have given the New York court no jurisdiction over her personally. To hold that her domicile might be changed to any other State by the act of her husband in removing thereto after he had abandoned her here and ceased to support her, and thus that she could be deprived of the protection in her marital rights, whether of person or property, which this State could extend to her, would be to

use the legal fiction of the unity created by the marriage to her serious injury, and to work great injustice.

If the decree of the New York court is to have any validity here, it must be on grounds of comity. *Blackinton v. Blackinton*, 141 Mass. 432, 436. There can be no ground of comity which requires that we should recognize the decree of a New York court annulling a Massachusetts marriage between Massachusetts citizens, unless it had jurisdiction of both the parties; nor even if it did have such jurisdiction should it be recognized here, unless it was based upon grounds which are here held to be sufficient. Suppose two citizens of Massachusetts are married here, each of the age of eighteen years, have children, and then move to New York, where the husband obtains a decree of nullity on the ground that persons under the age of twenty-one years cannot lawfully marry. The children are not therefore rendered illegitimate in Massachusetts, so that they cannot here inherit their father's lands. Marriages between blacks and whites are still prohibited in some of the States, but a decree in such a State annulling a marriage of this character valid where contracted could not here be regarded. Illustrations of this sort, growing out of the different laws as to marriage in the several States, could readily be multiplied. The right of a State to declare the present or future status, so far as its own limits are concerned, of persons there lawfully domiciled, cannot be extended so as to enable it to determine absolutely what such status was at a previous time, and while they were subject to the laws of another State. The decrees of its courts in the latter respect must be subject to revision in the State where rights were then existing, or had been acquired. *Blackinton v. Blackinton*, 141 Mass. 432.

The cause alleged and found by the New York court was not sufficient to annul a marriage contracted in Massachusetts between its citizens according to the laws of this Commonwealth. Assuming that a marriage may here be declared void on account of fraud, and assuming that fraud is a cause which will enable the party defrauded to maintain a libel for the dissolution of the marriage which has thereby been procured, although the word "fraud," which is found in the Gen. Sts. c. 107, §§ 4, 5, is omitted in the Pub. Sts. c. 145, § 11, no fraud was shown such

as would enable a party here to avoid a marriage. Mrs. Richards was sane at the time of her marriage, and entirely competent to make the marriage contract; she had been insane at a previous period, but had recovered from such attacks, and the fact of such previous insanity was concealed from her husband by Mrs. Richards herself and her family, in the hope that marriage would prove beneficial to her health. She lived with her husband about a year and three months before symptoms of insanity again developed themselves. The possibility or probability that she might again become insane, growing out of the fact that she had previously been so, did not constitute such a fraud as entitled her husband to have the marriage dissolved.

There was no fraud of such a character as to affect the basis or the essential character of the contract. *Donovan v. Donovan*, 9 Allen, 140. *Foss v. Foss*, 12 Allen, 26. "It is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage. . . . Therefore no misconception as to the character, fortune, health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice." Bigelow, C. J., in *Reynolds v. Reynolds*, 8 Allen, 605.

Upon the ground, then, that the decree of the New York court attempts to annul a marriage contracted in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which, by the Massachusetts law, it cannot be avoided, we are of opinion that it should not be enforced here, and that no principle of interstate comity requires that we should give it effect.

For these reasons, a majority of the court are of opinion that the settlement acquired by Mrs. Richards by her marriage continues, and that judgment should be entered for the defendant.

Judgment for the defendant.

COMMONWEALTH vs. HENRY TOLMAN.

Plymouth. October 16, 1888. — May 11, 1889.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

*Attempt to commit Crime — Indictment — Description of Place — "Dam" or
"Dike" — Malice — Justification — Evidence — Exceptions.*

An indictment on the Pub. Sta. c. 210, § 8, for a malicious attempt to injure and destroy a dam situated in a certain town, sufficiently describes its location.

At the trial of such indictment there was evidence that the dam was erected across a river to improve a marsh, under the St. of 1871, c. 303, which required that proceedings therefor should be begun upon the petition of twenty proprietors of the marsh to the Superior Court; and the record of that court showed that it had acted upon what purported to be such a petition. *Held*, in the absence of proof to contradict the record, that no further evidence was necessary to show that the petition was in fact signed and presented by twenty proprietors.

The defendant, who admitted that he made the alleged attempt, offered evidence that he lived near the river, and earned his livelihood by fishing; that before the erection of the dam he had rightfully used the river, which was then navigable, for that purpose; and that because of such erection shoaling had taken place in the river below the dam, which had not been removed, and the river had been rendered unnavigable. The St. of 1871, c. 303, § 4, provided that such shoaling should be removed by the proprietors of the dam, or, on their failure, by public authority, at their expense. The defendant offered to prove that he knew these facts; and that it was a matter of common conversation in the vicinity that the dam was a "public nuisance and that any man had a right to destroy it." *Held*, that the evidence was inadmissible either in justification of the defendant's act or to meet the allegation of malice.

Under a general exception to a charge, the excepting party cannot be allowed afterwards to select particular phrases and found special exceptions thereon.

TWO INDICTMENTS for an attempt to destroy a town way, dam, or bridge. Trial in the Superior Court, before *Brigham*, C. J., who, after a verdict of guilty, reported the case for the determination of this court. The material facts appear in the opinion.

A. J. Waterman, Attorney General, & *H. C. Bliss*, First Assistant Attorney General, for the Commonwealth.

B. W. Harris & *H. Kingman*, for the defendant.

DEVENS, J. The defendant was tried and found guilty upon two indictments. The first indictment charged him with wilfully and maliciously attempting to destroy a certain part or portion of a town way legally laid out and established in Marshfield,

the property of the inhabitants thereof, by malicious means therein set forth. A second indictment in its first count alleged similar acts to have been done by the defendant in the attempt and with intent to injure and destroy a certain dam situated in the town of Marshfield, and the property of the inhabitants of Marshfield. The second count of the second indictment alleged the same attempt with the same intent upon the same dam, but averred the property of the dam to be in certain trustees. Upon both of these counts the defendant was convicted. This latter indictment contained a third count for a like attempt to destroy a public bridge; but as upon this the court directed a verdict for the defendant, it need not be here considered. Both indictments in all their counts alleged the failure of the defendant fully to complete his offence by the destruction either wholly or partially of the way or dam.

It is a general principle, that, when a consummated offence is indictable, attempts which, if successful, would have resulted in such offence are also indictable. The acts alleged, if done by the defendant, would have formed a part of the series which would have constituted an actual commission of the offence if it had been fully completed. Pub. Sta. c. 210, § 8. Many of the objections and exceptions taken apply to all the counts upon which he was convicted, but, for reasons which will hereafter appear, we have preferred to consider only those which relate to his conviction on the second count of the second indictment.

This count alleged the property in the dam to be in certain trustees named, and to this allegation the defendant made no objection, either by motion to quash, exception, request for ruling, or otherwise. He filed a motion to quash, applicable to this count, upon the ground that the location and situation were not described with proper accuracy. The dam was alleged to be situated in the town of Marshfield, and this was sufficient. In indictments for keeping or maintaining as a nuisance a particular building, it has often been held that its location need not be specifically described, and that it is sufficient if it is alleged to be in a certain town named. *Commonwealth v. Logan*, 12 Gray, 186. *Commonwealth v. Welsh*, 1 Allen, 1. *Commonwealth v. Gallagher*, 1 Allen, 592. So in an indictment for

obstructing a way, and thus committing a nuisance, it was held that it was sufficiently described by averring it to be in a particular town, and also, in an indictment for not repairing a highway, that it was not necessary to set out the termini of such highway. *Commonwealth v. Hall*, 15 Mass. 240. *Commonwealth v. Newbury*, 2 Pick. 51. The motion to quash was therefore rightfully overruled.

The St. of 1871, c. 803, may, so far as is necessary for the questions we are discussing, be briefly summarized. The proprietors of Green Harbor Marsh in Marshfield were authorized, in § 1, to erect a dam and dikes at a point specified, for the purpose of draining the marsh, and preventing the influx of the sea. These improvements were to be made under the direction of commissioners, to be appointed in the manner provided in the Gen. Sts. c. 148 (Pub. Sts. c. 189). Twenty of the proprietors were required to petition the Superior Court for the appointment of such commissioners, and full jurisdiction was given to it of all the proceedings, as provided in the Gen. Sts. c. 148. Section 2 authorized the proprietors to manage their affairs as the proprietors of general fields. Section 3 provided that the county commissioners of Plymouth County might contract with commissioners appointed by the Superior Court for the erection of a highway, bridge, and dam, without a draw, at the joint expense of the county and the proprietors. Section 4, which is the one of most importance in the case at bar, provided that, if shoaling should take place in the channel of Green Harbor River below the dam and dikes, said shoaling should be removed by the proprietors, under the direction and to the acceptance of the harbor commissioners; and that, if the proprietors should fail to remove said obstructions for six months after notice, the commissioners should cause the obstructions to be removed at the expense of the proprietors, who were made liable to the Commonwealth for the expenditure thus incurred, in an action of contract.

There was evidence that, by virtue of proceedings in the Superior Court, a dike or dam was built across Green Harbor River, which was completed in 1872, and was so constructed, with a sluiceway and gates, as to prevent the flow of the salt water on to the marsh above the dike, and to permit the fresh

water to flow through the same when the tide turned and was ebbing, or to retain the fresh water to irrigate the meadows above, although in fact it was not used for the last purpose. The dam or dike was constructed across a part of the river which was seventy feet wide at high water, and then navigable for small vessels, and entirely obstructed navigation above the same. There was further evidence, that the defendant had caused to be prepared a large tin can containing fifty-two pounds of Atlas powder or dynamite; that there were inserted therein two time fuses connected with the cartridges into which the powder had been divided; and that with this can the defendant went upon the dam in the night-time, near the sluiceway, with the intention of exploding the contents of the can on or under the dike, and of destroying the same, when he was arrested; and it was admitted at the trial that he was in the act of attempting to blow up the dike.

The defendant contends that, upon the evidence in the case, the Commonwealth failed to prove that the structure which he was charged with attempting to destroy was a dam within the meaning of the Pub. Sts. c. 208, § 85, and that an instruction to this effect should have been given. No argument has been founded, nor could any properly have been founded, upon any distinction between the words "dam" and "dike." This contention rests on the position that the Commonwealth — which had shown that the Superior Court had acted upon what purported to be the petition of twenty proprietors of the marsh lands, had heard this petition, and had passed upon and decided it by appointing commissioners, and ordering them to erect the dam, which had been done, and a report of their doings made and accepted — must show further that the petition was in fact signed and presented by twenty proprietors; and that until this was done, no part of the record of the proceedings was admissible. The Superior Court is a court of general jurisdiction, upon which was conferred, as may be presumed from its public importance, a jurisdiction in regard to the special proceedings for the erection of this dam. It was to act upon the petition of twenty proprietors, and it was competent to decide for itself whether it had been thus addressed. By its action its record shows that it had decided that the proceedings had been

thus initiated, and no further evidence was necessary. Whether its adjudication on this point would not have been conclusive had the defendant sought by any evidence to controvert it, we have no occasion now to decide. *Commonwealth v. Carr*, 143 Mass. 84.

The defendant further relied upon a justification of the acts done by him, and offered evidence that "since the construction and completion of the dike shoaling had taken place in Green Harbor River, and its approaches below the dike, above the level of mean low water, to such an extent as to practically make Green Harbor River and its approaches unnavigable; that such shoaling was caused by the dike; that prior to the completion of the dike Green Harbor River and its approaches were navigable, and for more than a mile above the dike; that the proprietors of Green Harbor Marsh were duly notified by the harbor commissioners, by notice dated September 13, 1876, to remove such shoaling; that no part of such shoaling had at the time of the alleged offence been removed by said proprietors, or any other party; that such shoaling is, because of the existence of such dike, constantly increasing; that the defendant was an inhabitant and resident of Green Harbor village, knew all of the facts stated in the foregoing offer, earned his livelihood by carrying on the business of fishing, and for this purpose had for many years prior to the erection of the dike used, and had the right to use, Green Harbor River and its approaches." The presiding judge declined to admit the evidence offered as a justification of the acts of the defendant, and ruled that "the act of the Legislature and the proceedings thereon contemplated as one of the results of the erection of the dike a shoaling of the river, and that the shoaling of the river and the purpose of the Legislature to open certain benefits for agricultural purposes in one direction, to the injury of certain other public interests in the way of navigation, gave no right to the parties who had interest in navigation to defeat the purpose of the Legislature in the matter of this provision for agriculture."

The contention of the defendant at the trial and in the argument of the case at bar is, that "the act of 1871, c. 303, when accepted and acted upon by the proprietors of Green Harbor Marsh, became an executed contract between such proprietors

and the Commonwealth, by the terms of which both parties were bound ; and the proprietors upon proper notice were bound to remove any and all shoaling above the level of mean low water in Green Harbor River and its approaches caused by such dike, and if they did not remove such shoaling forfeited the right to keep and maintain such structure, and said dike became and was a nuisance ; and any person having the right to use or navigate Green Harbor River or its approaches would have a right to abate such nuisance and remove said dike."

The reasons upon which it has been held that, when a party suffers an immediate injury from an obstruction in the highway, as from a gate erected thereon wrongfully, he may remove it in order to pass, have no application to a case such as the one at bar. The dam had been lawfully erected upon proceedings had under the statute, and had been constructed by the authority of the Legislature, which, anticipating that one of the results might be the shoaling of the river below the dam, had provided a full and adequate remedy against this by imposing upon the proprietors a certain duty in relation thereto, and, in case of a failure on their part for a certain length of time, upon a body of the public authorities, the harbor commissioners, representing the Commonwealth, for whose expenditure the proprietors were afterwards bound to reimburse the Commonwealth. The ground upon which a party may sometimes act in the removal of a nuisance, that in the exercise of his right he cannot wait for the slow processes of law, has here no application.

The injury which the defendant sustained, in being unable to use the stream below, was immediately caused by neglect of the proper precautions for which the statute had provided, and which had resulted in the shoaling of the water. The remedy for this was, not to destroy the structure, but to enforce through the proper authorities the provisions of law by which this injury to navigation below the dam had been anticipated and guarded against. Nor, if we should concede the defendant's proposition that the proprietors would be indictable for a nuisance in failing to remove the shoaling occasioned by this bridge, would it by any means follow that one situated as the defendant claimed to be would be authorized to destroy it. A

corporation which was authorized to maintain a bridge, and to keep it in safe and proper condition for use, might be indicted for failing to keep it in proper repair, but it could not therefore be rightfully destroyed by one who had occasion to pass over it. *Commonwealth v. Central Bridge Co.* 12 Cush. 242, 244. Nor is any case presented here such as that of *Arundel v. M' Culloch*, 10 Mass. 70, where a bridge, without any authority of law, had been erected across a navigable stream, and it was held that one having occasion to pass with his vessel might lawfully break through the same, doing no more damage than was necessary for his passage.

The structure in the case at bar did not become a wholly unlawful structure because the proprietors had neglected to perform an important but subordinate duty in its management, by the non-performance of which, and not by the dam itself, injury might result to persons situated as was the defendant. The provisions of the statute made to enforce the performance of this duty were ample. Even if the necessity had been immediate on the part of the defendant that the accumulation should be removed, it does not appear, nor was there any evidence, that the destruction of the dam would have enabled him at once to use the stream below the dam or that at the time he had any occasion so to do. He was not then navigating the stream, nor was it shown that the removal of the dam would have removed the shoaling. He sustained no special or peculiar damage different from that of the rest of the community.

While the presiding judge refused to receive the evidence above stated as a justification of the acts of the defendant, he ruled that, under the indictments, any evidence tending to show that the defendant believed that he had a right to do the acts charged was admissible. The defendant, if the facts offered do not constitute a justification, contends that they were admissible as tending to show cause for belief on the part of the defendant that he had a right to destroy the dam, and excepts to the ruling of the judge to receive them for this purpose. This contention is in effect that, if not a justification, such facts may at least afford an excuse for acts of the defendant, and meet the allegation of malice. When the facts offered fail to show that the defendant had any right to destroy the

dam, and when the law must be presumed to be known to him, proof of such facts could have no tendency to show a belief that the law was different, or that his legal rights were different from those which actually existed. The question is, indeed, on this point, as to the state or condition of his mind and his honest belief; but to have this effect, and to be available as evidence on this point, they must be connected with evidence that on such a state of facts he had been advised, and thus honestly believed, that he had a right to destroy the dam, or with other evidence of a similar character. The defendant did not do this, and the evidence was properly rejected in this aspect of the case. Apparently the defendant sought thus to connect it by proof that it was a matter of common conversation in the vicinity of Green Harbor, that the dike "was a public nuisance and that any man had a right to destroy it." But he did not offer evidence of a common or public reputation to this effect, or that he had ever been so advised, or that any similar statement had ever been made to him, or in any conversation in which he participated. This evidence was, therefore, properly rejected.

In the charge of the presiding judge, the nature of the malice which the Commonwealth was required to prove was clearly and fully explained to the jury, and accurately defined. Nor has the defendant insisted on any objection to this as a general statement, although he now excepts to a single remark made by the presiding judge, to the effect that, "when a man is doing something which he thinks he has an honest right to do, he has no occasion for secrecy, he has no occasion for darkness, he has no occasion to hide, for he is acting in the belief that he is doing just what he has a right to do." If this remark is to be construed as anything more than a submission to the jury of the circumstances of the defendant's conduct as bearing on his alleged guilty purpose, or is for any other reason objectionable, the defendant did not at the time take an exception thereto, so that it might, if desired, have been more clearly limited, expressed, or explained. Under a general exception or objection to a charge, one cannot be allowed to select afterwards particular phrases and found special exceptions thereon. *Curry v. Porter*, 125 Mass. 94. *McMahon v. O'Connor*, 137 Mass. 216. *Wright v. Wright*, 139 Mass. 177. Some other exceptions were

taken by the defendant at the trial, but they have not been insisted upon in argument, and, on examining them, we do not deem it necessary to discuss them.

As we are of opinion that the exceptions of the defendant must be overruled so far as the second count of the second indictment is concerned, we have not deemed it necessary to discuss his exceptions so far as they relate solely to the first indictment, or to the first count in the second indictment. All the counts in both indictments are clearly but different descriptions of the same offence by which, if guilty, the defendant has incurred but a single penalty. In the first indictment the allegation is the attempted destruction of a town way, the property of the town of Marshfield; in the first count of the second indictment, of a dam the property of the town of Marshfield. These allegations involve the questions whether a town way had been, or could lawfully have been, laid out over the dam, and if so, whether such way could be described as of the property of Marshfield, and also whether the dam itself could be described as of the property of Marshfield. In the view we have taken of the conviction of the defendant under the second count of the second indictment, these questions are not now of importance in the case at bar, and are hardly more than speculative.

If we assume that all might be decided in favor of the defendant, it would not diminish the penalty to which he is exposed, and to which he may be sentenced by reason of his proper conviction under the second count of the second indictment. Nor if these questions were otherwise decided would it add to his liability. It is, therefore, a sufficient disposition of the case submitted to us by the report to hold that, on the entry of a *nolle prosequi* by the Commonwealth on the first indictment and on the first count of the second indictment, there may be on the second count of the second indictment

Judgment on the verdict.

WILLIAM J. MCGEE & others vs. CITY OF SALEM.

Essex. November 8, 1888. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, C. ALLEN, & KNOWLTON, JJ.

Tax — Building as Real Estate — Payment under Protest — Recovery back.

A building affixed to land cannot be taxed as "real estate" apart from the land to which it is attached.

If such a building is owned separately from the land as personal property, it cannot be taxed as real estate to the owner so as to create a lien; and if such owner before paying the tax sells it, the purchaser will not succeed to any personal liability of the owner to pay the tax, but, upon paying it after a protest in writing, may recover it back.

CONTRACT to recover \$31.40, the amount of a tax paid under protest. Trial in the Superior Court, without a jury, before Brigham, C. J., who allowed a bill of exceptions, in substance as follows.

This action was heard and determined by the court, upon finding the facts following. Prior to May 1, 1884, one Putnam was the owner of greenhouses upon land owned by one Emmerton, on Crombie Street, in Salem. The assessors of the defendant city assessed to Emmerton taxes upon the land for the year 1884, and to Putnam "upon the greenhouses thereon, as real estate," as well as upon other land on Mason Street in Salem, the stock in the greenhouses, valued at \$500, being assessed to Putnam as personal estate. The entire tax assessed in 1884 to Putnam on his real and personal estate was the sum of \$59.75. Subsequently, Putnam was declared to be an insolvent debtor, and in settling his estate his assignees in insolvency sold the greenhouses to the plaintiffs, on January 1, 1886. The tax for the year 1884 on the greenhouses remaining unpaid in July, 1886, the defendant's collector of taxes proceeded to collect it by a sale of the greenhouses as real estate, after due notice, by public auction.

Before the day appointed for the sale, the plaintiffs duly paid the tax to the collector, after signing a protest in writing, but in paying it did not claim that the tax had been illegally assessed, or that the same should be apportioned, or ask of the collector so to apportion it that they could avoid the sale of the greenhouses by paying so much of the tax assessed to Putnam on the green-

houses as "real estate" as applied to them only, and not to the land on which they were.

The judge ruled that upon these facts the action could not be maintained, and found for the defendant; and the plaintiffs alleged exceptions.

C. A. Benjamin, for the plaintiffs.

F. L. Evans, for the defendant.

FIELD, J. We understand from the exceptions that the tax on the land upon which the greenhouses stood, was assessed to Emmerton, and that in this assessment the greenhouses were not included, and that the tax on the greenhouses, considered apart from the land, was assessed to Putnam as a tax on real estate. This separation of the greenhouses from the land on which they stood implies that the assessors considered that the greenhouses belonged to Putnam as personal property. These taxes were assessed as of May 1, 1884. Putnam, after this tax was assessed to him, became an insolvent debtor, and the assignees of his estate, on January 1, 1886, sold the greenhouses to the plaintiffs. The plaintiffs, therefore, so far as appears, took an absolute title to the greenhouses, unless there was a lien on them in favor of the city of Salem for the payment of the tax assessed to Putnam.

The Pub. Sts. c. 11, provide, in § 8, that "real estate, for the purposes of taxation, shall include all lands within this State, and all buildings and other things erected on or affixed to the same"; in § 18, that "taxes on real estate shall be assessed, in the city or town where the estate lies, to the person who is either the owner or in possession thereof on the first day of May"; in § 20, that "all personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town where he is an inhabitant on the first day of May, except," etc.; and in § 53 require that the buildings and lots of land be separately described.

In *Milligan v. Drury*, 130 Mass. 428, it was in effect decided that buildings affixed to land, under an agreement between the owner of the land and the owner of the buildings that they should remain personal property, might be assessed with the land to the landowner; and it was said that "the assessors were not obliged to inquire into the private contracts between the

parties, but had the right to do as they did, and assess together as real estate the land and the buildings affixed thereto." It follows from this decision, that the land and the buildings affixed thereto could be assessed together as real estate to the person in possession of the land and the buildings on the first day of May, as well as to the owner of the land.

The question did not arise in that case whether a tax can be assessed upon buildings which are personal property as a separate tax from that assessed on the land to which the buildings are affixed, and the question whether, if a tax can be so assessed, the buildings should be taxed as real or personal estate, was not considered. There are difficulties whatever view is taken. If the owner of the buildings is an inhabitant of another town within the Commonwealth than that in which the buildings are situated, and the buildings may be assessed to him in one town as personal property, and also may be assessed in the other town as a part of the land to the landowner or person in possession of the land, then there may be double taxation at the election of the assessors of the different towns.

While the statutes expressly declare that for the purposes of taxation real estate shall include buildings affixed to land, and expressly provide for a separate description and valuation of the buildings and the lots of land, yet the provisions relating to the collection of a tax on real estate by a lien upon it and a sale of it, or of the rents and profits, or by the purchase of the real estate in behalf of the city or town, or by the taking of it for the city or town, as well as the provisions for the redemption by the owner of real estate so taken or sold, are, in many respects, inapplicable to buildings which are personal property, and which must at some time be removed from the land, or taken down if the owner of the land requires it. Pub. Sts. c. 12, §§ 24-58. Buildings affixed to land are in their nature real property, and they are only considered as personal property between the parties to an agreement making them such and those who purchase the land with knowledge of the agreement; they pass as a part of the land to a purchaser for value without notice. *Hunt v. Bay State Iron Co.* 97 Mass. 279. *Dolliver v. Ela*, 128 Mass. 557.

The questions we are discussing were considered in *Flanders v. Cross*, 10 Cush. 514, but it was not necessary there to decide

them, although it was said that "there is no power in the collector to divide the property, to levy on the building severed from the land, as divisible parts of the same piece of real estate." This statement we think is true. As the statutes relating to a sale of real property to satisfy the lien for taxes do not provide for a sale of a building apart from the land on which it stands, and as some of the provisions are inconsistent with such a sale, we think it follows that a building affixed to land cannot be taxed as real estate except in connection with the land to which it is affixed. The tax assessed to Putnam on these greenhouses as real estate, therefore, was unauthorized, and it is unnecessary to consider whether they could have been taxed to him as personal estate.

It is contended that, if these greenhouses were wrongly included in the real estate of Putnam for the purpose of taxation, yet, as other land in Salem was rightly taxed to him, Putnam's remedy would have been by a petition for abatement, and not by action, and that the plaintiffs have only the rights and remedies which Putnam would have had if he had not become an insolvent debtor, and had remained the owner of the greenhouses. *Howe v. Boston*, 7 Cush. 273, 274.

It has been decided that for the collection of a tax assessed on real estate a city or town has a remedy against the person and the property generally of the person to whom the tax has been assessed, and is not confined to the sale of the real estate itself. *Sherwin v. Boston Five Cents Savings Bank*, 137 Mass. 444. *Richardson v. Boston*, 148 Mass. 508.

It may be conceded that, if Putnam had remained the owner of the greenhouses, the collector of taxes could have taken them by distress, under the Pub. Sts. c. 12, §§ 8, 9, or have maintained an action of contract against him, and attached them under § 20 of the same chapter, and that therefore Putnam could not maintain the present action if he had paid the tax, because unless there is an abatement the assessment is good as against him, and he is personally bound to pay the tax. But the plaintiffs by purchasing the greenhouses did not succeed to the personal obligation of Putnam to pay the tax. If the tax was a lien on the greenhouses, the lien might have been enforced even after the plaintiffs became the owners; but if there was no lien, the

houses after they became the property of the plaintiffs could not have been sold to pay a tax assessed to another person. As we have held that the houses considered apart from the land could not lawfully be assessed to Putnam as real estate, the tax would not constitute a lien upon the greenhouses, although it might remain a valid tax against Putnam, because only taxes assessed on real estate constitute a lien.

As the plaintiffs were never personally liable to pay the tax, and as there was no lien upon the greenhouses whereby they could be sold to satisfy it, the remaining question is whether the plaintiffs could pay the amount of the tax under protest to the collector of taxes, who was unlawfully proceeding to collect it by a sale of the greenhouses, and then bring an action to recover what they had paid. The wrong of the collector is in threatening to take one man's goods to pay a tax assessed to another. It may be said that the payment was not compulsory, because the collector held no warrant authorizing him to levy upon or to sell the property of the plaintiffs. If the collector had intermeddled with the greenhouses by taking possession, or by delivering possession to another person, the plaintiffs could have maintained trespass, or trover, or replevin. Independently of statute, it may be that this action could not be maintained. See *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181; *Forbes v. Appleton*, 5 Cush. 115; *Barrett v. Cambridge*, 10 Allen, 48.

But by the Pub. Sts. c. 12, § 84, one of the alternative conditions under which a tax paid may be recovered is that it was paid by the plaintiff, after "a protest by him in writing." In the present case, this was done. We think that the Legislature intended by this provision that any person upon whom a collector makes a demand for the payment of a tax included in his warrant, on the ground that he is personally liable to pay it, or whose property the collector proceeds to sell, on the ground that it is liable to be taken to satisfy such a tax, may, instead of resisting the collector, or resorting to other remedies, pay the tax under written protest, and bring suit to recover the amount paid. Such a course is the least troublesome of any judicial proceedings which can well be taken to settle questions which are often of great difficulty. We think that, on the facts recited in the exceptions, the action can be maintained.

Exceptions sustained.

JAMES S. CUMSTON & others vs. ELIZA D. BARTLETT
& others.

Suffolk. January 29, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Devise — Residuary Clause — Execution of Power.

A general residuary devise will operate as an execution of a power to dispose of property by will, unless there is something to show that such was not the testator's intention.

A testator, by his will, after devising the "M. H. estate, that is, all of my interest therein," proceeded to recite a power given him to dispose of his interest in that estate, which was held in trust and of which he had the income for life, and added that he disposed of his interest in that estate by virtue of that power; and in the next clause he devised "all the rest, residue, and remainder of my estate, both real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease," but did not mention a like power to dispose of a similar interest in two other estates. The testator had other property upon which the residuary clause would operate. *Held*, that the testator's interest in the other two estates passed under the residuary clause.

BILL IN EQUITY, filed October 12, 1888, by the executors and trustees under the will of Charles L. Smith, against the trustees and beneficiaries under the will of Stephen Smith, for instructions. Hearing before W. Allen, J., who reserved the case for the consideration of the full court, in substance as follows.

Stephen Smith, who was the father of Charles L. Smith, died on April 14, 1875, leaving a will, which was duly admitted to probate, containing the following provisions:

"All of the rest, residue, and remainder of my estate, both real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, I give, devise, and bequeath as follows, that is to say: I direct that the same be divided into four equal parts as nearly as may be. Three of said four parts I give, devise, and bequeath to my four children: Mrs. Eliza D. Bartlett, wife of John B. Bartlett, Adeline A. Allen, wife of Wm. Henry Allen, Charles L. Smith, and Edward F. Smith, in equal proportions, share and share alike, to have and to hold the same to them, their heirs, and assigns forever, excepting and provided that my said son, Edward F. Smith, shall have twenty-five thousand dollars less than

each of the other said children, that sum having been already advanced to him in his business. I give, devise, and bequeath the remainder, said fourth part, to said Charles L. Smith and John L. Lothrop, of Somerville, Mass., physician, to them, their heirs and assigns, and the survivor of them, his heirs and assigns, but nevertheless in trust, to be managed and improved, with power to sell and convey any part of the same, and reinvest the avails thereof, and to change any investment at any time, to collect the income, and, after deducting a reasonable compensation for their services as trustees, to pay over and divide the same, the said net income, equally among my said children, share and share alike, and to the survivor or survivors of the same, for and during their natural lives, in the event of either dying without issue then alive, and without a will disposing of his or her share of the principal estate, as hereinafter provided.

"It is my will that each of my said children shall have the right and power to dispose by will of his or her share, to wit, one fourth part of the said fourth part, as they may see fit; and in case such disposition is made of the same, the trustees are to convey the same accordingly, discharged of all trusts; but in case either shall die without such will, leaving issue then alive, his or her share shall be paid and conveyed by said trustees to the issue so left.

"In case all my said children shall die leaving no issue and without a will disposing of their shares, as hereinbefore provided, then it is my will that the said fourth part, or what may then remain thereof, go and be paid to my legal heirs, the same as if then inherited by them of me."

The one fourth part of the estate of Stephen Smith set apart, under the above clause of his will, consisted of three parcels of real estate in Boston: the Minot Hall estate, so called, situated on the corner of Washington Street and Springfield Street; an estate on Brookline Street; and another on West Canton Street. John L. Lothrop and Charles L. Smith were duly appointed trustees under the will of Stephen Smith, and continued to act together as such until the death of Lothrop, subsequently to which Charles L. Smith continued to act as sole trustee in the management of the above named estates, until he died on March 18, 1888, when new trustees thereof were appointed. Charles L.

Smith, who had never married and had no children, left a will, which was duly admitted to probate, and which, after providing among other things for an annuity for his aunt, Temperance L. Howes, and that the persons named as trustees should be executors, contained the following provisions :

" 2. The Boston Five Cents Savings Bank holds a mortgage for thirty-five thousand dollars, given by me as trustee, on the property known as Minot Hall, situated at the corner of Washington Street and Springfield Street in said Boston. My will is that this mortgage debt be paid off out of my estate as soon as may be conveniently after my decease, and the mortgage discharged. I then give and devise the said Minot Hall estate, that is, all of my interest therein, to James S. Cumston, Wm. Henry Allen (my brother-in-law), and Stephen S. Bartlett of said Boston, but nevertheless in trust, as follows, viz.: My father, Stephen Smith, by his last will and testament, dated March 4th, A. D. 1875, and duly probated in the Probate Court for the County of Suffolk, gave and devised one of the four parts into which the residue of his estate named in said will was divided, to myself and John L. Lothrop, and the survivor of us, in trust for the purposes and with the powers specified and set forth therein. Said Lothrop having died, I have been managing and holding the trust estate under said devise of my father as the surviving trustee. By virtue of the power given by my father in said will to his children to dispose by will of his or her portion or share, I wish and do give and devise my share and interest in the said Minot Hall estate, held by me as trustee, and in which I have as an individual one fourth interest under the said will, with a power of disposal as aforesaid, to the said Allen, Cumston, and Bartlett, named as trustees as above, to be held, managed, and improved, with power to sell and convey the same, and reinvest the avails thereof, the sale being either at public auction or at private sale as they deem best, and with power to change any investment at any time, the net income realized to be paid and divided equally among my brother and sisters, such as may survive me, share and share alike, and to the survivor or survivors of them, for and during their natural lives, in the event of their dying without issue, that is, without children then living, and without a will disposing of his or her share of the

principal estate, as hereinafter provided. It is my will that each or either of my brother and sisters shall have, and I hereby give each of them, power to dispose of his or her share or portion of the principal estate hereby devised in trust as they may see fit, by a last will and testament, and in case this is done, then the same is to be conveyed accordingly, discharged of all trust created by this will, the rest of the said property to remain subject to the trust so long as the others may survive. But in case either shall die without a will disposing of his or her share as aforesaid, leaving children then surviving, his or her share of the principal estate shall be paid and conveyed by the trustees then acting to such child or children discharged of all trusts, share and share alike if there be more than one child, the trust continuing as to the balance of the property so long as either my brother and sisters may live.

"3. All the rest, residue, and remainder of my estate, both real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise, and dispose of as follows, viz.: It is to be divided into twelve equal parts as nearly as conveniently may be. Two of these parts I give and devise to my nephew William Lothrop Allen on his reaching the age of thirty years; should he die before arriving at that age, then these two parts are to go and be conveyed to his mother. Three of the said parts are to go and be paid to my nephew Stephen Smith Bartlett upon his reaching the age of thirty years, and should he die before arriving at that age then the said three parts are to go and be paid or conveyed to his mother. The said nephews are each to be allowed to have, and are to be paid, the net income of their said respective parts or portions after my decease, and from the time when the division is made as aforesaid in settling my estates, until they shall respectively arrive at the said age of thirty years, if they live so long. The other seven parts are given and devised to the said James S. Cumston, Wm. Henry Allen, and Stephen S. Bartlett, as trustees, for the uses, purposes, and with the powers following, to wit: They are to hold the same in trust, manage and improve the same, with power to sell and convey the same at private sale or public auction, to invest the avails thereof, and to change investments at any time, or to mortgage the

same for the purposes of the trust, if need be, and out of the net income thereof they are to pay, first, to my cousin, George L. Stafford, yearly the sum of five hundred (500) dollars, in equal quarter-yearly payments; next, the annuity of one hundred dollars a year to my said aunt, Temperance L. Howes, as provided hereinbefore, the same being paid semiannually in equal instalments, and being made a charge only upon the said seven parts. The rest of the said income is to go and be paid to or for the benefit and support of my brother, Edward F. Smith, and his children. The trustees for the time being are to divide and pay the same to or for the benefit of my said brother and his children, in such sums, and in such a way and manner, and at such times, and for such purposes, as they in the exercise of their best discretion may see fit and deem best, for and during the natural life of my said brother, having the right and power at any time, in their discretion, to withhold all or any part of the income from my said brother, and pay and use the same to or for the benefit of his children, and also having the right and power in the exercise of their discretion to withhold any part of the income from either of his children, and to pay the same, or use the money, for the benefit of such other of the children as they see fit, and in such a way as they deem best, the whole matter of the division and expenditure of the money for the use and benefit of my said brother and his children during his life being committed to the full control and discretion of the trustees. Upon the decease of my said brother, leaving children surviving him, it is my will that the principal estate of the said seven equal parts, and all the accumulations thereof then remaining, shall go, subject to the said annuity charge, to his children living at the time of his decease, in equal shares. His or her portion of the income is to be paid to each, until they arrive respectively at the following ages, to wit, the boys thirty years, and the daughters twenty-five years, and when they shall arrive at these ages respectively, or as fast as they do, his or her share shall then be paid to them; that is, their share of the principal sum, discharged of all trusts. It is however provided, that if any of the children of my said brother living at his decease shall not arrive at the said required age for the enjoyment of his or her share of the principal sum

discharged of all trusts within twenty-one years after the death of my said brother, then all such shall have and receive and be entitled to his or her portion, discharged of all trusts, at the expiration of that period. In speaking of the children of my said brother under this trust, I mean to include only the children by his present wife, and to exclude such as he may have, if any, by any other wife, should the present one die and he marry again. In case of any of the children of my said brother dying after his decease, and before they become of the requisite age as aforesaid to be entitled to their share of the principal sum, and without children living, then his or her share shall go and be paid to and divided among the surviving brothers and sisters, share and share alike, standing thereafter the same as their other respective portions under this clause of my will."

The two daughters of Stephen Smith, who still survive, contended that the interest of Charles L. Smith in the estates on Brookline Street and West Canton Street did not pass by the residuary clause of his will, but remained to be administered by the estate created under the will of Stephen Smith.

The legatees and beneficiaries under the residuary clause of the will of Charles L. Smith contended that his interest in such estates had passed under such residuary clause, and was to be administered for their benefit.

Under the residuary clause of Charles L. Smith's will, besides the property in question, in which his share was of the value of \$5,000 only, property passed of the value of \$55,000.

F. Ranney, for the daughters.

J. F. Colby, for the legatees and beneficiaries under the will of Charles L. Smith.

C. ALLEN, J. The general rule is now well established in this Commonwealth, that a general residuary devise will operate as an execution of a power to dispose of property by will, unless there is something to show that such was not the testator's intention. *Amory v. Meredith*, 7 Allen, 397. *Willard v. Ware*, 10 Allen, 263. *Bangs v. Smith*, 98 Mass. 270. *Sewall v. Wilmer*, 132 Mass. 131. The third article of the will of Charles L. Smith contained a general residuary devise, and the only question is whether there is anything sufficient to show that he did not thereby intend to execute the power given to him by the

will of his father. The matters chiefly relied on to negative such intention are, that he never had owned the property of which he had a right of disposition, that he did own other property which would be covered by the residuary devise, and that in the residuary devise he did not refer in terms to the power, while in the second article of his will he did expressly refer to and recite it.

The fact that he never had owned the property is not of much importance. The same fact existed in *Bangs v. Smith* and *Sewall v. Wilmer*, above cited. The fact that he owned other property upon which the residuary devise would operate, is one which would usually occur, and is of no controlling weight. The fact that he expressly referred to and recited the power in article two, and omitted all mention of it in article three, is of more significance, and may well raise a doubt as to the testator's real intention; but even that is open to the suggestion that, having fully stated the power once, he did not think it necessary to do so again. It is to be observed that in disposing of the Minot Hall estate in article two, he at first speaks of it as if it was his own property. He says, "I then give and devise the said Minot Hall estate, that is, all of my interest therein." After this, he proceeds to recite the power given in his father's will, authorizing him to dispose of the one fourth interest whereof he was to have the income for life, and adds, that by virtue of the power thus given he makes disposition of his share and interest in the Minot Hall estate. Having thus dealt with the Minot Hall estate, he went on in article three to devise "all the rest, residue, and remainder of my estate, both real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease." He spoke of the Minot Hall estate in the first place as if it were his own; he afterwards spoke of his share and interest therein, and then he went on to dispose of all the residue of his estate of which he should die seised and possessed, or to which he should be entitled at his decease. The fact that the Minot Hall estate thus spoken of just before was his own only in a qualified sense, carries with it some implication that his disposition of the residue was intended to include all property which was his in the same sense.

The language used by the testator in reference to the Minot

Hall estate is an illustration of the reason which has led to the establishment of the general rule which now prevails in England (St. 7 Will. IV. & 1 Vict. c. 26, § 27), as well as here, that where one has the use and income of land during life with a power of disposition after death, it is natural for him to consider and treat it as his own property. Nobody else has any control over it or interest in it, provided he chooses to exercise his power of disposition. It seems more probable that this was the testator's view, in making his residuary devise. Certainly nothing is found in article three, taken by itself alone, to show that he did not intend to include all the property which he had a right to dispose of; and not enough appears in the whole will, with the facts and circumstances disclosed, to take the case out of the general rule.

Ordered accordingly.

ARTHUR W. BLAKE & another vs. TRADERS' NATIONAL BANK.

Suffolk. January 30, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, & HOLMES, JJ.

Trust — Breach by Trustee — Payment by Sureties — Contribution — Subrogation.

A trustee, to secure his private debt, pledged shares of stock belonging to the trust estate to a bank, which sold them and applied the proceeds on the debt. The executors of a surety on the trustee's bond paid to the trust estate the value of the stock, with interest thereon from and after a certain date, up to which time first the trustee and then a co-surety on his behalf, to conceal the misappropriation and to prevent a further breach of trust, made good to the *cestuis que trust* the dividends on the stock. *Held*, that the executors could not recover from the bank, in addition to the amount paid by them to the trust estate, interest thereon prior to such date and during the time such co-surety paid the dividends.

BILL IN EQUITY, filed June 27, 1884, by the executors of one of two sureties upon the bond of a trustee, to recover the value of shares of stock belonging to the trust estate, which shares had been wrongfully pledged to the defendant by the trustee, and

the proceeds of which it withheld, and the value of which the executors had been compelled to make good to the trust estate. After the former decision, reported 145 Mass. 13, the case was heard upon agreed facts among others, by *Field, J.*, who reserved it for the consideration of the full court. The material facts appear in the opinion.

J. L. Thorndike, for the plaintiffs.

H. G. Parker, for the defendant.

W. ALLEN, J. The defendant sold and applied on the individual debt of the trustee certain shares of stock, which were trust property and had been pledged to it by the trustee. The plaintiffs' testator was a surety on the trustee's bond, and the plaintiffs made good the loss to the trust fund. It was held in 145 Mass. 13, that the plaintiffs were subrogated to the right of the *cestuis que trust*, and could recover of the defendant the amount for which the stock was sold, with interest from the time of the sale. After that decision the defendant was allowed to amend its answer by setting up that the dividends on the shares sold were paid to the *cestuis que trust* by the trustee after the sale, until January 1, 1877, and that the plaintiffs paid only the amount for which the stock was sold by the defendant, with interest thereon from that date. It is agreed that sums equal to the dividends on the stock were paid to the *cestuis que trust*, until April, 1878, by the trustee, and from that time until January, 1877, by the testator's co-surety, without the knowledge of the testator, and that the plaintiffs paid interest only from the time that such payments ceased.

The plaintiffs do not claim that they should recover interest for the time during which the trustee paid the dividends, and the only question is, whether they can recover interest for the time during which the co-surety of their testator paid the dividends. The plaintiffs cannot recover this interest in their own right, because they did not pay it and could not have been subrogated to any rights of the *cestuis que trust* on account of it. The payments by the sureties were several, and not joint. The only ground upon which the plaintiffs can rest a claim is, that they can enforce a right of subrogation acquired by the co-surety when he paid the amounts of the dividends to the *cestuis que trust*. But it does not appear that

any such right was acquired, or could have been enforced by him.

The agreed facts state that the amount of the dividends was accounted for to the *cestuis que trust* to January, 1877; that in 1878 the trustee became incapacitated to act, or to make any payments, and that after that time the money was paid by the co-surety, he being aware that the shares had been misappropriated by the trustee, and not disclosing that fact, and it does not appear that any claim has ever been made by him, or in his behalf, on account of such payments, except that set up by the plaintiffs in this proceeding. With knowledge of all the facts, the co-surety paid the dividends as they became due, and accounted for them for the trustee.

The facts tend to show that he made the payments in behalf of the trustee, to conceal the misappropriation of the stock by him, and to prevent a further breach in not paying the dividends, rather than because of any liability that he was under in consequence of the non-payment. The purpose of the surety in making the payments seems to have been to prevent any right from accruing to the *cestuis que trust* against the trustee, in consequence of the non-payment. He was under no obligation to the plaintiff's testator not to make voluntary payments in behalf of the trustee; the payments when made were not such that the maker acquired any right against the defendant; and the plaintiffs' right of contribution against the co-surety cannot give them any right against the defendant. For these reasons, without considering the other objections argued, we think that the plaintiffs cannot recover interest before January 1, 1877.

Decree accordingly.

EDWIN MOREY & others vs. AMERICAN LOAN AND TRUST COMPANY & others.

Suffolk. February 4, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, & HOLMES, JJ.

Trust — Suit against Executors of Trustee — Statute of Limitations — Culpable Negligence.

A beneficiary under a trust, who had assigned his interest, assuming to act as such, brought a bill in equity against the executors of the trustee, for a breach of trust, on the last day within the time limited by the Pub. Sts. c. 186, § 9, for suits against executors, both in his own behalf, and, as authorized by them, in behalf of his co-beneficiaries, who believed him to be still a beneficiary, and who did not know that he had assigned his interest until a later day. *Held*, that such co-beneficiaries were not chargeable with culpable negligence, within the meaning of the Pub. Sts. c. 186, § 10, in not prosecuting their claim within the time limited, and might maintain another bill in equity for the same cause of action.

BILL IN EQUITY, by certain beneficiaries under a trust, against the first named defendant and others, trustees, including the executors of the will of one Pomeroy, to recover for alleged breaches of trust. Hearing before *Knowlton, J.*, who reported the case for the consideration of the full court. The material facts appear in the opinion.

F. Paul & W. W. Gooch, for the plaintiffs.

M. F. Dickinson, Jr., & H. R. Bailey, for the executors.

W. ALLEN, J. To this bill brought against trustees by several *cestuis que trust* in behalf of themselves and all others in the same interest who may come in to prosecute the suit, the executors of one of the trustees, who are made defendants, plead the statute of limitations of actions against executors. The plaintiffs rely upon the Pub. Sts. c. 186, § 10, which authorize a judgment notwithstanding the statute of limitations, if the court is of opinion "that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited."

On the last day within the time limited for bringing actions against executors, one Friend, as one of the *cestuis que trust*, and in behalf of all the others who might come in, brought a bill against these defendants for the same cause of action set

forth in this bill. The only ground for finding that the plaintiffs were not chargeable with culpable neglect in not prosecuting their claim within the time limited, is the pendency of the suit of Friend. That suit was brought with the knowledge and for the benefit of the plaintiffs. Where there are many parties interested in a cause of action upon which a suit may be commenced by one in behalf of all who may come in, a suit commenced by one in behalf of all would seem to be a sufficient prosecution of the claim by all who rely upon such suit; so that if they afterwards come in and become parties, they will be deemed to have prosecuted their claim at the time the suit was commenced. If a suit for the same cause of action has been duly commenced and is pending, which the creditor has a right to join in and prosecute as a party, it cannot be necessary that he should commence a separate action in order to prevent the bar of the statute unless he shall actually come into the suit within the time limited for commencing actions. If it were so, every creditor who could not actually be admitted as a party of record to the first suit before the expiration of the two years limited by the statute would be obliged to commence a separate suit.

In this case, the authority of Friend to commence the suit in behalf of these plaintiffs was not only inferred by law from his relation to them as it appeared on the record, but was actually given by them. If the suit had been properly commenced in the name of Friend, and the plaintiffs had at any time been admitted as parties, we think it would have been a prosecution of the claim by them within the time limited. But the suit was not properly commenced in Friend's name, and the plaintiffs were not, and cannot be, admitted to prosecute it, and it has been dismissed on the plea that Friend had no interest. If the suit of Friend had been properly commenced, the plaintiffs would have been admitted to prosecute it, and there need have been no other prosecution of their claim to prevent the bar of the statute. They believed that the prosecution of their claim commenced in the name of Friend could be maintained, and for that reason did not prosecute it in their own name. If they were not negligent in entertaining and acting on that belief, they are not chargeable with culpable negligence in not otherwise prosecuting their claim within the time limited by the statute.

Friend had been a *cestui que trust*, and the plaintiffs believed him to be one when his suit was commenced, and until, after the application of the plaintiffs to be admitted to prosecute that suit, it appeared upon the plea of the defendants that his interest had been assigned before the suit was commenced. The plaintiffs knew that Friend had been a *cestui que trust*, and did not know of his assignment, and were mistaken as to the fact of his being a *cestui que trust* when the suit was commenced. It was this mistake of fact which prevented them from prosecuting their claim within the time limited, and they were not guilty of culpable negligence therein, if their belief that Friend was a *cestui que trust* was a reasonable belief entertained without negligence.

It is to be observed that the particular thing in reference to which negligence is alleged was not a thing in which either party had a special interest, or in reference to which the plaintiffs owed any special duty to the defendants. The plaintiffs knew that the time within which an action could be commenced was about expiring, and their interest was that the time should not expire before a suit should be brought. Whether the suit should be in the name of one *cestui que trust* or of another was immaterial alike to the plaintiffs and to the defendants. If Friend was a *cestui que trust*, there was no advantage to the plaintiffs or detriment to the defendants that the suit should be in his name rather than in that of another, and there was no reason that it should be in his name, except that he was one of the parties in interest. The suit was commenced by him as a *cestui que trust* in his own behalf and in that of the plaintiffs. Nothing appears that should suggest to the plaintiffs that he had divested himself of the interest that he once had; and it is admitted by the defendants that the plaintiffs "were informed and believed" that he then had the same right of action that they had. We think that they were justified in acting upon the knowledge and information which they had, and were not put upon further inquiry whether Friend had not assigned the interest which by bringing the suit he asserted remained in him.

As the plaintiffs are not chargeable with culpable negligence in not prosecuting their claim within the time limited by the statute, and as no circumstance appears that renders it inequitable that they should now prosecute it, justice and equity require that they should be allowed to do so.

Plea overruled.

CHRISTINA J. BURGESS vs. HERBERT F. DOBLE & others.

Suffolk. March 12, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Appeal Bond in United States Court — Damages.

An appeal bond in an equity suit in a court of the United States to recover land, given in the form required by the U. S. Rev. Sta. § 1000, does not include damages for rents and profits, or for the use and detention of the land pending the appeal, unless they are recovered in the suit.

CONTRACT. The defendants demurred to the declaration; and the Superior Court sustained the demurrer, and ordered judgment for the defendants. The plaintiff appealed to this court. The allegations of the declaration and the grounds of demurrer, so far as material to the point decided, appear in the opinion.

H. H. Mather, (*H. H. Smith* with him,) for the plaintiff.

A. A. Ranney, for the defendants.

FIELD, J. This is an action on a bond given on an appeal from the Circuit Court to the Supreme Court of the United States. It is impossible to ascertain from the plaintiff's declaration the precise nature of the suit in equity which she brought in the Circuit Court of the United States. The declaration refers to the record of the case in the Circuit Court, but a copy is not annexed, and we do not know what that record is. The declaration alleges, however, that it was a suit in equity to recover land; that on April 21, 1882, she obtained a decree in her favor against Peter Graffam and Herbert F. Doble, one of the defendants in the present suit; that they were, on July 8, 1882, ordered to execute a deed of the land to her, in a form which had been approved by a master; that they appealed from the decree to the Supreme Court of the United States, and upon appeal executed, with sureties, the bond on which the present suit is brought, a copy of which is annexed to the declaration; that the appeal was entered and heard by the Supreme Court, and that court affirmed the decree of the Circuit Court,

with costs; that in pursuance of the mandate of the Supreme Court, the Circuit Court, on June 14, 1886, entered a decree in favor of the plaintiff, "and the proceedings terminated"; "that on September 21, 1886, the said costs were paid by the defendants, and on May 28, 1886, a deed was executed and delivered by said Graffam and Doble to the plaintiff, as ordered by said court"; and that "on March 3, 1886, the plaintiff took possession of her premises."

The damages claimed are the value of the "rents and profits and use and occupation from April 21, 1882, to March 3, 1886; . . . and also a further sum, for the use of a certain mineral spring situated upon said premises, of the use and benefit of which she was wrongfully deprived," and from which she could have derived great profit.

The defendants contend that the damages claimed were not covered by the condition of the bond, and could not be recovered in this action.

The bond is signed by Doble as principal, and by the other two defendants in the present suit as sureties, and recites that a decree has been rendered in the Circuit Court of the United States for the District of Massachusetts in favor of the plaintiff, against Graffam and Doble, from which they have appealed, and the condition of the bond is, "that if the said Peter Graffam and Herbert F. Doble shall prosecute their said appeal to effect, and answer all damage and costs, if they fail to make their plea good, then the obligation to be null and void," etc. The breach alleged is that Doble and Graffam have not answered and paid all damages, as, by the condition of the bond, they ought to have done. This is the usual form of bond given in appeals from the Circuit Court to the Supreme Court of the United States when there is a stay of execution. U. S. Rev. Sts. § 1000.

It sufficiently appears from the declaration, that the final decree entered in pursuance of the mandate of the Supreme Court of the United States has been fully performed by the defendants in that suit, and that the proceedings have terminated, so that no judgment for damages for mesne profits can be rendered in that suit. The appeal has been prosecuted "to effect," and all damages and costs for which judgment has been rendered have

been paid. We are of opinion, that, under the existing decisions of the Supreme Court of the United States, the condition of the bond does not include damages for rents and profits, or for the use and detention of the land pending the appeal, unless they are recovered in the suit. See *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 398; Rule 29, 108 U. S. 590.

It is said in argument, that the suit referred to in the declaration is reported in 117 U. S. 180, under the name of *Graffam v. Burgess*. The decree recited in the opinion in that case is a decree for redemption. Whether any proceedings were had in that suit, in order to state the account between the parties up to the time when the defendants were finally ordered to convey the land to the plaintiff, we do not know. As this case comes before us upon demurrer to the declaration, we can consider only the declaration, and that sets out no breach of the bond, but in legal effect avers that the condition of the bond has been performed.

Judgment for the defendants affirmed.

NORMAN B. PROBERT *vs.* WALTER T. PHIPPS & another.

Middlesex. March 13, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Master and Servant — Due Care — Experiment before Jury.

A boy, fifteen years old, while attempting to stop one of two machines in a mill, upon which he was at work, was caught in gearing projecting from the other, and was injured. At the trial of an action to recover for such injuries, there was evidence that the machines stood side by side, the starting apparatus of one and gearing on the other so projecting from the side of each as to leave a passageway about a foot wide between them; and he testified that before the accident he had learned how to run the machines, and had been warned to be careful and not get caught; that he knew if he got near revolving machinery he would get caught by it; that in starting and stopping the machines he used this passageway; that he had to go there often, and was familiar with the place; that the gearing was uncovered; that he knew he was likely to be caught, and tried to guard against it in stopping or starting them; and that he had to stoop down in doing so, and had then in mind the danger of being caught. *Held*, that he was not in the exercise of due care, and could not maintain an action against his employer for the injury so received.

TORT for personal injuries sustained by the plaintiff while in the defendant's employment. Writ dated November 4, 1887. Trial in the Superior Court, before *Bishop, J.*, who allowed a bill of exceptions, which, so far as material, is as follows.

The plaintiff testified that he became fifteen years old in February, 1887; that on June 6, 1887, he went to work in the defendants' silk mill upon filling-machines run by steam power, never having worked on machinery before; that his work was to spread out upon an extension raw silk, which was then drawn in by gearing and cog-wheels so as to spread the raw silk around the outside of a large cylinder under several rows of teeth; that he then cut the silk below each row of teeth into strips, and took the silk off upon boards used for the purpose, and carried it to another part of the mill for further manufacture; that he tended two filling-machines, which stood side by side, with a passageway between them just wide enough for him to get through; that in stopping and starting the machines he went in between them by this passageway; that in order to put the raw silk on the extension he stopped a machine by shifting the belting on the side of the machine by which the power was transmitted to it, and then started it in the same way; that the machine ran until the silk was wound around the cylinder; that he then stopped it again to cut and take off the silk; that the gearing of one machine was opposite to the apparatus for starting and stopping the other; that there was no boxing or other protection of any kind on the gearing; that when he was first employed by the defendants, James Imeson, the boss of that part of the mill, told him to "look out and be careful and not get caught," but did not tell him what he was to be careful about, or what he was not to get caught in, and turned him over for further instruction to Thomas Trainer, a boy of about his own age, who ran a third filling-machine, which stood beside the other two but was somewhat different from them; that some of the men in the mill told him to look out and be careful and not get caught; that he stayed for about half a week with Trainer, who showed him how to run his machine, and for the rest of the week he assisted another boy in running the other two machines, and was then himself put in charge of them; that on June 27, 1887, in going between the machines to stop one of

them, his trousers were caught in the gearing which projected from the other, and which was moving rapidly, and his left leg was drawn into the gearing from the knee down to the ankle, and so injured that amputation was necessary.

On cross-examination he testified that he had attended school until he was fourteen years of age; that he had worked for over a year in making fireworks, where he had to be very careful; that his father was a machinist, and employed in machine works, which he had visited in doing errands, and had there seen machinery in operation; that he did not know anything about machinery; that on these visits he kept away from the wheels when they were revolving because he was afraid he might get caught if he went too near; that he received no further instruction in the use of the filling-machines other than as above stated; that he knew if he got near revolving machinery he would get caught; that before the accident he had learned how to run the machines; that he knew there was a liability of being caught when he went in to stop or start a machine, and tried to guard against it; that he had to go there often, and was familiar with the place; and that he had to stoop down to stop or start the machines, and had in mind the danger of being caught in doing so.

There was evidence that the passageway between the machines was three feet and two inches wide; that the projections of the gearing and starting and stopping apparatus into this passageway were from eleven and one half to fourteen inches on the one side, and sixteen inches on the other; but whether these extreme projections came opposite to each other in the passageway was in dispute.

The defendants produced and had set up in the court-room a filling-machine, which was the machine on which this accident happened.

The plaintiff testified that it was in this gearing that his leg was caught. While testifying, he endeavored to operate, in the presence of the jury, the apparatus for starting and stopping the machine. As the machine stood in the court-room, this apparatus was on the further side of the machine, out of sight of the judge and the jury, and to inspect it the jury left their seats and passed to that side of the machine. The apparatus

consisted in part of a slide, which moved the belt from a loose pulley to a fast pulley to start the machine, and reversely to stop it. Before moving the slide it was necessary to draw out a pin which held it in place, and the plaintiff had not done this while showing the movement in the presence of the jury. The plaintiff's counsel in his argument contended that the manner in which the plaintiff operated the apparatus for starting and stopping the machine when the jury were viewing it tended to show that to move the belt from one pulley to the other was manifestly beyond the plaintiff's strength; and that he could not do it without stooping and straining, or without going between the projecting parts above mentioned. Imeson testified, for the defendants, that this movement could be made without difficulty, and that he could do it without going as far into the passageway as the projections; and by working on the machine he illustrated that the plaintiff had not first taken out the pin before attempting in the presence of the jury to move the slide.

What was done by the plaintiff and Imeson was without the sight or knowledge of the judge, and he first learned of the alleged difficulty which the plaintiff had in operating the machine by the comments of counsel in their arguments, and he ruled that it was not evidence in the case, and that his refusal so to consider it was not open to the plaintiff on exceptions.

On the above evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

H. N. Sheldon, for the plaintiff.

R. M. Morse, Jr., & E. Tappan, for the defendants.

FIELD, J. We think that it appears, from the testimony of the plaintiff himself, that the danger of getting caught in the gearing was obvious, and that he well understood what this danger was and how it was to be avoided, and that it was from his own want of care that he was injured. See *Sullivan v. India Manuf. Co.* 113 Mass. 396; *Rock v. Indian Orchard Mills*, 142 Mass. 522; *Gilbert v. Guild*, 144 Mass. 601; *Ciriack v. Merchants' Woolen Co.* 146 Mass. 182.

It is unnecessary to decide whether the presiding justice could or could not properly have permitted the plaintiff to work the machine in the presence of the jury for the purpose of showing that he had not sufficient strength to work it. It does not

appear that any request had been made that this might be done, or that the presiding justice or the defendants understood that the plaintiff was working the machine in the presence of the jury for any such purpose. Apparently the machine had been set up and was shown to the jury for the purpose of enabling them to understand better how the accident happened. If the exhibition had been intended to show anything else, a request should first have been made to the presiding justice, and the defendants should have had an opportunity to object to it, as well as an opportunity to test the evidence thus produced if the request had been granted, and the experiment should have been tried under the supervision of the presiding justice.

Exceptions overruled.

MARY B. CUMMINGS vs. ANDREW WATSON & another.

Suffolk. March 15, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Heirs — Administrator as Agent — Landlord and Tenant — Use and Occupation.

The heirs of a person deceased, intestate, agreed that one of them should be appointed administratrix, and manage and receive the rents of the real estate; and a tenant at will of the intestate, who continued to occupy a part of the real estate, paid to her rents accruing before and after his death, but made no contract with her as administratrix or otherwise for the occupation of the premises. *Held*, that in receiving such rents from him she acted as agent merely, and could not as administratrix maintain an action against him for subsequent use and occupation.

CONTRACT by the administratrix of the estate of Nathaniel Cummings for the six months' use and occupation of certain real estate. Trial in the Superior Court, without a jury, before *Lathrop, J.*, who allowed a bill of exceptions, in substance as follows.

There was evidence that the defendants had been in possession of a shop, being the premises in question, as tenants at will under the plaintiff's intestate, whose sole heirs at law were the plaintiff and her sister; that, after his death, it was agreed between

them that the plaintiff should be appointed administratrix of the estate, and should manage and control the real estate, and account therefor; that she has ever since managed and controlled the real estate, including the premises in question; that prior to the death of Nathaniel the defendants paid rent to his agent; that after his death they paid for four months' occupation, a part of which was before and the remainder after his death, to the same agent, who was authorized by the administratrix to receive the rent, and gave to the defendants receipts signed "Mary B. Cummings, Admnx."; and that the defendants knew of Nathaniel's death, but made no express contract for the use of the premises thereafter. There was no evidence that the defendants had any knowledge of the agreement between the heirs other than as above stated.

The judge found for the defendants, upon the ground that the plaintiff had no right, as administratrix, to maintain the action for the use of the premises; and the plaintiff alleged exceptions.

G. B. Upham & F. W. Proctor, for the plaintiff.

J. A. Maxwell & J. D. McLaughlin, for the defendants.

FIELD, J. The death of Nathaniel Cummings terminated the tenancy at will of the defendants. The plaintiff and her sister are the heirs at law of Nathaniel Cummings, and in the absence of any contract with them or with any one else for the occupation after the death of Cummings, the defendants would be liable to pay rent to the heirs at law as owners, by virtue of the Pub. Sts. c. 121, § 3 (Gen. Sts. c. 90, § 25). It was competent for the court to find on the evidence, and apparently the court has found, that the defendants made no contract for the occupation of the premises with the plaintiff as administratrix, or with the plaintiff in any capacity. The agreement between the heirs that the plaintiff should be appointed administratrix, and should manage the real property and account to the estate of Cummings for the rents, did not vest the title to the real property in the plaintiff as administratrix. She, as administratrix, was not sole seised of the real property, but she and her sister remained jointly seised of it, as heirs. The Pub. Sts. c. 144, § 5, (Gen. Sts. c. 98, § 8,) provide a method of accounting when an executor or administrator uses, occupies, or receives the rent of real estate with the

assent of the heirs, but such an executor or administrator occupies as an agent of the heirs, unless he is an heir himself and occupies in his own right. *Almy v. Crapo*, 100 Mass. 218.

Whether the plaintiff could sue as administratrix, if, while in possession as such, she had let the premises to the defendants, or they had promised to pay rent to her, need not be decided. As no contract with the plaintiff has been found to exist, the suit should have been brought by the heirs at law.

Exceptions overruled.

WILLIAM J. GILFILLAN vs. SAMUEL MAWHINNEY.

Suffolk. March 18, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Fraudulent Representations — Prospectus — Declaration — Amendment
— Evidence — Exceptions.*

In an action for false representations in a prospectus, the declaration alleged that all the statements in the prospectus, and especially certain ones referred to, were false; and the judge, who tried the case without a jury, excluded evidence of the falsity of statements other than those specially referred to, and, in finding for the defendant, found specially that the "plaintiff did not rely on the statements of fact contained in the prospectus." *Held*, that the special finding rendered the ruling of the judge as to the evidence immaterial.

A bill of exceptions, stating that questions were put to a witness, and that the judge admitted them, without disclosing what the answers were, shows no ground of exception.

TORT for false representations. The amended declaration contained, among other allegations, the following: "And the plaintiff says that the defendant, then being interested in, and a large stockholder in, and a director, president, and chairman of the executive committee of the Bay Ridge Steamship Construction Company, made and issued, or caused to be made and issued, or allowed and permitted to be made and issued a certain prospectus or paper, a copy of which is hereto annexed marked 'A,' and bearing his name as president and director, with the purpose of inducing the public to subscribe for and purchase the shares of said corporation, whereby he would derive a pecuniary

benefit; that all the statements of said prospectus, both in fact and opinion, were false, fraudulent, and misleading, and especially the statements contained in the said circular or prospectus setting forth the value of the real estate, and the price paid for it, and the amount of money paid into the capital fund of said property, and the right of the company to extend its piers, were false and misleading; . . . that the plaintiff read said circular or prospectus, and said false and misleading statements, and especially the ones hereinbefore referred to, and believing the same to be true, and relying upon the same as true, was thereby induced to and did subscribe for and purchase a large number of the shares of the capital stock of said corporation. . . . And the plaintiff further says, that the shares of said capital stock of said corporation at the time of the issuing of said circular or prospectus, and at all times thereafter, and now, are utterly worthless, and that he has lost all the money so paid by him to said corporation for or on account of said shares." The prospectus, annexed to the declaration, consisted of a pamphlet of several pages of printed matter. Answer, a general denial. .

Trial in the Superior Court, without a jury, before *Mason, J.*, who allowed a bill of exceptions, which, so far as material, was as follows.

The plaintiff called as a witness A. Perry Bliven, a director of the company, and, after calling his attention to a specific statement in the prospectus annexed to the declaration, put to him the question, "Is that statement true?" To this question the defendant objected, on the ground that the question had reference to a representation which had not been specifically set forth in the declaration. The judge ruled that the plaintiff, in introducing evidence as to representations contained in the prospectus annexed to the declaration, must be confined to those representations which were specifically set forth in the declaration, and excluded the testimony.

The defendant put certain questions to various witnesses, among them directors of the construction company, all of which the judge, against the plaintiff's objection, permitted them to answer, those to the directors being admitted as bearing on the question of their good faith, but the bill of exceptions did not disclose what any of the answers to these questions were.

The judge made the following finding for the defendant: "In the above action the court finds for the defendant, and finds specially that the plaintiff did not rely on the statements of fact contained in the prospectus signed by the defendant." The plaintiff alleged exceptions.

C. C. Read, for the plaintiff.

R. M. Morse, Jr., for the defendant.

HOLMES, J. This is an action for false representations in a prospectus. The declaration alleges that all the statements in the prospectus, and especially certain ones referred to, were false. The judge excluded evidence of the falsity of statements other than those specially referred to. The prospectus was long, and the representations of such a nature that the defendant would have had to be prepared on a wide field of inquiry, if he was bound to be ready to sustain the whole prospectus. As the plaintiff did not see fit to amend, and to specify the statements which he proposed to controvert, after the judge's ruling, we might hesitate to order a new trial in such a case, even if, as a mere matter of pleading, the declaration was enough to put the truth of the whole prospectus in issue.

But, however this may be, we understand the finding of the judge, that the plaintiff did not rely upon the prospectus, to go to the document as a whole, and to mean that he was satisfied that none of its statements, true or false, operated as an inducement to the plaintiff to subscribe for stock in the company. There would be no significance in the special finding, unless it imported that it was made on grounds which were independent of the evidence excluded, and which made that evidence immaterial. If we are wrong, the fault is in the bill of exceptions, and the excepting party must suffer.

The finding of the judge makes the questions of evidence immaterial. Furthermore, it does not appear that the plaintiff was injured by the answers, and most of the evidence objected to went to the good faith of co-directors who signed the prospectus, and with whom the declaration alleged the defendant to have acted in collusion.

Exceptions overruled.

MARY A. REARDON vs. ANNIE T. THOMPSON.

Suffolk. March 19, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Personal Injuries — Licensee on Land — Dangerous Hole.

An open hole in the earth, which is not concealed otherwise than by the darkness of the night, is a danger which a mere licensee going upon the land must avoid at his peril.

HOLMES, J. This is an action for personal injuries caused by the plaintiff's falling into a hole which was dug, we will assume, by the defendant, and which was nine inches in the defendant's land and extended nine inches into the land of a neighbor, Mrs. Appleton, by her license. The land in question was a strip eight feet wide, running back from Pope Street, in East Boston, between the defendant's house and Mrs. Appleton's. Of this eight feet, nine inches only belonged to the defendant, and seven feet three inches to Mrs. Appleton. The plaintiff was going to another house of the defendant on the rear end of her lot, to which the proper entrance was from the rear. So far as appears, she was on Mrs. Appleton's land at the time of the accident.

The argument for the plaintiff is based on the assumption that she was invited to pass over the eight-foot strip. But there is no evidence that she was invited there either by the defendant or by Mrs. Appleton. The failure, if there was any, to prohibit the use of the strip was not an invitation to use it. *Galligan v. Metacommet Manuf. Co.* 143 Mass. 527. Neither were the facts that the houses were near together, and that the only approach to the rear house, directly from Pope Street, was over the strip. The defendant's lawful obstruction of her own land was not an invitation to go upon Mrs. Appleton's, and Mrs. Appleton's partial obstruction of her land was not an invitation to persons visiting the defendant's tenants to go upon the unobstructed part. We must assume that there was a lawful passage from the rear house to some street. The defendant was under no obligation to furnish short cuts from every street in the

neighborhood. This is not a case like *Toomey v. Sanborn*, 146 Mass. 28, where a third person was held liable for opening a hole in what was conceded to be a private way.

The fair conclusion from the plaintiff's evidence is that she was a trespasser. But if we assume that the jury might have found that there had been such use of the strip and such acquiescence on the part of the owners as to imply a license, still the plaintiff cannot recover. No doubt a bare licensee has some rights. The landowner cannot shoot him. It has been held that an owner would be liable for negligently bringing force to bear upon the licensee's person, as by running him down without proper warning. *Byrne v. New York Central & Hudson River Railroad*, 104 N. Y. 362. *Taylor v. Delaware & Hudson Canal Co.* 113 Penn. St. 162, 175. Compare *Metcalf v. Cunard Steamship Co.* 147 Mass. 66. *Batchelor v. Fortescue*, 11 Q. B. D. 474. It is not necessary to say that no species of pitfall or trap could be conceived for which a landowner would be answerable. *Bolch v. Smith*, 7 H. & N. 736, 747.

But the general rule is, that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 372. *Zoebis v. Tarbell*, 10 Allen, 385. *Heinlein v. Boston & Providence Railroad*, 147 Mass. 136. *Files v. Boston & Albany Railroad*, ante, 204. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731. *Sullivan v. Waters*, 14 Ir. C. L. 460. *Parker v. Portland Publishing Co.* 69 Maine, 173. *Byrne v. New York Central & Hudson River Railroad*, 104 N. Y. 362, and cases cited.

Exceptions overruled.

W. N. Osgood, for the plaintiff.

J. A. Maxwell, for the defendant.

CHARLES W. SAWYER vs. ELLEN MACKIE.

Suffolk. March 19, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Assessment of Taxes on Real Estate — Deceased Owner — "Person."

Taxes on real estate must be assessed, under the Pub. Sts. c. 11, § 13, to the living owners of real estate; and an assessment to a person deceased, who owned such real estate at his death, is illegal and void.

WRIT OF ENTRY to recover a parcel of land in South Boston. Plea, *nul disseisin*. Trial in the Superior Court, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows.

The demandant claimed title under two tax collector's deeds, dated in 1885 and 1886, respectively. The statutory requirements necessary to the validity of these deeds were admitted by the tenant to have been complied with, except in regard to the person to whom the assessments were made. These assessments were made in 1884 and 1885, respectively, to John O. Bradford, a resident of the State of New York, who acquired title to the property in 1862, and retained it until his death in 1879. At the dates of the assessments, there was in this Commonwealth no record of his death; no probate proceedings had been instituted upon his estate; there was no evidence that the assessors had received any notice of his death; and the title stood in his name at the registry of deeds. The tenant was in possession of the land on May 1, 1884, and also on May 1, 1885. The demandant contended that, the assessments having been made to Bradford, the person appearing of record as the owner of the land, he should be held to be the true owner thereof for the purposes of assessing and collecting the taxes, and that the assessments to him were consequently valid.

The judge ruled that, inasmuch as Bradford was dead, no valid assessment could be made to him, and directed a verdict for the tenant; and the demandant alleged exceptions.

J. P. Treadwell & E. B. Hagar, for the demandant.

R. Lund & M. J. Creed, for the tenant.

MORTON, C. J. Our statutes provide that, "for the purpose of assessing and collecting taxes, the persons appearing of record as owners of real estate shall be held to be the true owners thereof. Taxes on real estate shall be assessed, in the city or town where the estate lies, to the person who is either the owner or in possession thereof on the first day of May." Pub. Sts. c. 11, § 13.* The natural and obvious meaning of the word "person" is a living human being. When the statutes speak of a person who has died, they speak of him as a "person deceased," or a "deceased person." A dead man cannot be the owner of property. We see no reason to suppose that the statute above cited intends to use the words "persons" and "owners" in any other than their usual sense. The clause first cited was designed to meet the cases where real estate has been conveyed by deeds which are not recorded before the first day of May. The subsequent sections of the statute make provision for assessing the estates of persons who have died before the first of May. Pub. Sts. c. 11, §§ 18, 19. Undoubtedly it will sometimes happen that the assessors will fail to receive information of the death of a former owner of real estate, but the statutes provide for such a contingency by giving them the right to reassess the taxes to the person who is taxable. Pub. Sts. c. 11, §§ 79, 80. We are therefore of opinion that the assessments of the taxes upon the premises in question for the years 1884 and 1885 to John O. Bradford, who died in 1879, were illegal, and that the Superior Court rightly directed a verdict for the tenant.

Exceptions overruled.

* See St. 1889, c. 84.

OAKLEY W. ALDEN vs. HORACE K. THURBER & others.

Suffolk. March 20, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Contract of Sale — Offer of Compromise — Mutual Rescission — Waiver of Breach — Accord and Satisfaction.

A firm agreed to sell pure raspberry jam to a customer, who upon its being sent to him remitted to the firm a part of the agreed price. After receiving the jam, he found and claimed that it was not pure jam within the meaning of the contract, upon which the firm wrote to him expressing its regret at his dissatisfaction, and adding that it was "willing to receive the whole lot back and credit it up to you, together with all freight charges, and in this way settle the matter, as we do not care to lose your trade. . . . Advise us when and how you ship the jam." The customer thereupon sent back the jam, except a small portion sold by him, requesting the firm to "remit our money at once," whereupon the firm credited him with the jam returned, and with freight and cartage, and remitted to him the balance due him. *Held*, that there was a mutual rescission of the contract, and a waiver and an accord and satisfaction of any prior breach thereof.

CONTRACT. The declaration was in three counts, the first of which was for the breach of an agreement by the defendants to sell to the plaintiff pure raspberry jam, and the second and third counts for a balance of an account between the parties alleged to be due the plaintiff. Trial in the Superior Court, before *Lathrop, J.*, who reported the case for the determination of this court, the report so far as material being as follows.

The following facts appeared in evidence. The plaintiff, a grocer and dealer in jams in Boston, on August 25, 1882, gave an order to the defendants, who were grocers and manufacturers of jams in New York, for raspberry jam, receiving from the defendants at the time the following, signed by them: "Memorandum. . . . Abt 10,000 lbs. raspberry jam, 11 cts., pure," the word "pure" being underscored. No time for delivery was expressly agreed upon in the contract. The plaintiff, after some correspondence with the defendants respecting the credit to be given him, on August 31, 1882, wrote to them: "Enclosed find check for (\$1000) one thousand dollars, to be applied in payment for ten thousand pounds pure raspberry jam, ordered August 25."

Between September 5 and October 6, 1882, the parties had some correspondence as to the quality of various samples of jam submitted to the plaintiff in half-barrels and gallon cans, and on the latter date the plaintiff wrote to the defendants: "We expect you to ship us without delay ten thousand pounds pure raspberry jam, as per agreement. If sample sent in gallon cans is a pure article, and the berries sound, we would like goods at once. We think we have serious grounds for complaint in the way we have been delayed and bothered, being unable to fill orders." On October 9 the defendants wrote they would ship twenty-five kegs of about one hundred and twenty pounds each that week, and balance of ten thousand pounds within ten days after hearing from the plaintiff that the quality of that shipment was satisfactory; and at intervals between October 13 and November 21, 1882, shipped to him, in four lots, ten thousand one hundred and forty-five pounds of jam. After the first shipment was received by the plaintiff, without an examination of the same, having an order for jam, he sold one keg from that shipment.

Before December 14, 1882, the defendants drew a sight draft on the plaintiff for \$114.20, which was returned with the indorsement, "Goods not what was ordered, — will write"; and on that date, and again on December 27, 1882, the defendants wrote, expressing their surprise at the return of the draft, and said they had not received any letter of explanation, and asking for an explanation at once. On December 30, 1882, the plaintiff replied: "I have waited for your final shipment to have different shipments for comparison with sample of Thurber's best goods, sent in gallon cans to represent what was to follow. I have submitted same to experts, who pronounce it totally and altogether inferior to gallon cans. . . . We have entire amount of jam, except one keg sold, and would be pleased to return goods and recover money." On January 5, 1883, the defendants wrote: "Unless you at once remit check to cover past due balance of account, \$303.38, we shall place it in the hands of our attorney for collection." On January 13, 1883, the plaintiff wrote, referring to a letter received from the defendants' attorney, saying that the jam sent was not what he ordered, and proved to be a very inferior and unsalable article; that he held it subject to the defendants' order and risk; and refused to receive

it, and asked what disposition the defendants desired to make of the goods; adding, "I also notify you that I shall hold you responsible for the damage and loss I have suffered by your breach of the contract." On January 22, 1883, the defendants replied: "I regret very much your dissatisfaction about that lot of raspberry jam. Having seen the attorney's letter, I spoke to Mr. H. K. Thurber about it, and after discussing the matter he desires me to say, that, notwithstanding the fact that Mr. Chase insists that the goods were like the sample, he is willing to receive the whole lot back and credit it up to you, together with all freight charges, and in this way settle the matter, as we do not care to lose your trade, and we always desire to give our customers satisfaction. Advise us when and how you ship the jam." This letter was signed by one Wallis, a salesman, who, it was admitted, was duly authorized. After this letter was received by the plaintiff, he had samples of the goods taken from each of the shipments and put into small glass jars, for the purpose of using the same as evidence of the article received by him in any subsequent action against the defendants for damages, and shipped back all the rest, except the keg sold on October 30, 1882, sending to the defendants, on January 25, 1883, these statements, with amounts paid for freight and cartage: "We send this day, per Metropolitan S. S. Line (93) ninety-three kegs mdse," and "Received 94 kegs, \$102.59; returned 93 kegs, sold 1 keg." No signature was attached to either statement, but they were written on letter-heads of the plaintiff.

On February 2, 1883, the defendants wrote: "We send you by express to-day a sample of the raspberry jam which we took out of the first keg we opened. I want you personally to examine it, and tell me frankly if you can find any just cause for complaint. As I told you before, we always desire to please our customers, and for that reason we receive it back, and credit it up to you; but we really do not see in what respect the jam was wrong." To this the plaintiff replied, on February 6, 1883: "Yours of February 2d received, and contents noted. . . . Remit our money at once and oblige." On February 8, 1883, the defendants wrote: "As requested by yours of the 6th inst., we beg to enclose our check for \$837.86, amount to your credit, which please acknowledge." No further correspondence passed

between the parties. The plaintiff had purchased teas of the defendants in September and October, 1882, and this sum was the amount of a balance remaining after deducting from the \$1,000 the bills for such teas, a discount on account, and freight and cartage. No interest on the use of the \$1,000 was included in the sum forwarded.

The plaintiff testified that, by reason of the failure to receive the jam ordered, he was without raspberry jam, was unable to fill his orders, and thereby suffered damage. He also offered to prove by expert testimony that the alleged jam sent by the defendants was not raspberry jam at all, but an entirely different article, not salable as raspberry jam, or suitable to use in this market, or of any value.

The judge being of the opinion, on the foregoing evidence and offer of proof, that the action for damages on the first count could not be maintained, ordered a verdict for the defendants on that count, a verdict being returned for the plaintiff on the second and third counts as agreed by the parties; and reported the case for the determination of this court. If the plaintiff was entitled to maintain the action on the first count, a new trial was to be ordered; otherwise, judgment was to be entered on the verdict.

E. Avery & C. Q. Tirrell, for the plaintiff.

A. Hemenway, for the defendants.

MORTON, C. J. The defendants agreed to sell to the plaintiff about ten thousand pounds of pure raspberry jam. They sent the jam to the plaintiff at Boston, and he remitted to them one thousand dollars in part payment of the agreed price. After the receipt of the jam, the plaintiff found and claimed that it was not pure raspberry jam, such as the contract called for. Some correspondence ensued between the parties, and on January 22, 1883, the defendants wrote to the plaintiff as follows: "I regret very much your dissatisfaction about that lot of raspberry jam. Having seen the attorney's letter, I spoke to Mr. H. K. Thurber about it, and, after discussing the matter, he desires me to say, that, notwithstanding the fact that Mr. Chase insists that the goods were like the sample, he is willing to receive the whole lot back and credit it up to you, together with all freight charges, and in this way settle the matter, as we do not care

to lose your trade, and we always desire to give our customers satisfaction. Advise us when and how you ship the jam." Upon the receipt of this letter, the plaintiff sent back the jam, except one keg which had been sold, and requested the defendants to "remit our money at once." The defendants thereupon credited the plaintiff with the jam returned, and the expenses of freight and cartage, and remitted to the plaintiff the balance of the \$1,000 due him.

This was a mutual rescission of the contract. The letter of the defendants was an offer to settle and compromise the controversy between the parties. The acts and conduct of the plaintiff were an acceptance of that offer. This was a waiver of the right to sue for any preceding breach of the contract. The performance by the defendants of the new agreement operated as an accord and satisfaction for any breach, and discharged the old contract. Such was clearly the intention of the defendants, and as the plaintiff accepted their offer unconditionally, and thus induced them to perform it, he cannot now say that he had a concealed intention not to discharge the prior breaches of the contract. This would be bad faith. *Rogers v. Rogers*, 139 Mass. 440.

For these reasons, we are of opinion that the Superior Court rightly directed a verdict for the defendants on the first count.

Judgment on the verdict.

GEORGE S. BARTON vs. HERBERT RADCLYFFE.

Suffolk. March 20, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Pleading — Equitable Defence — Payment — Equitable Set-off — Conversion — Collateral Security — Tender.

Under the St. of 1883, c. 223, § 14, permitting equitable defences in actions at law, such a defence must be one within the rules and principles of equity jurisprudence.

In an action on a judgment recovered by the payee of a note against the maker on his default, alleged to be brought for the benefit of an assignee of the judgment, the answer alleged that, when the judgment was obtained, the note, upon which

the assignee was a co-promisor or indorser, had been actually paid by such assignee, as the payee well knew, and the maker had learned thereafter; that the judgment had not been assigned by the payee to the assignee; that the note was given for a loan with which to buy stock; that the maker upon buying it at once transferred it to such assignee for transfer to the payee as collateral security for the note; that the assignee had not transferred such stock, but had wrongfully converted it to his own use; and that thus it would not be equitable or just that such assignee should retain such stock and still recover the amount of the judgment from the maker. The answer contained no averment that the assignee was irresponsible; nor did the maker tender what was due on the note to entitle himself to a return of the collateral security. *Held*, that an equitable defence within the meaning of the St. of 1883, c. 223, § 14, was not disclosed by the answer.

CONTRACT on a judgment brought, as recited in the writ, "for the benefit of George M. Rice, assignee" of the judgment, which it was alleged was recovered by the plaintiff against the defendant in the Superior Court, on July 12, 1879, and upon which an execution was duly issued and remained unsatisfied in part. The answer was as follows:

"The defendant says that he and George M. Rice, who is named as the beneficiary plaintiff in said action, were stock holders in a corporation called the 'Boston Journal of Commerce Publishing Company,' the defendant owning and holding forty-two shares of said stock, the par value of which was \$100 a share; that the defendant, desiring to obtain more of said stock, and not having ready money with which to purchase the same, conferred with said Rice in regard thereto; that said Rice then proposed to the defendant that he, the said Rice, would get George S. Barton, the nominal plaintiff in said action, to lend \$1,000 to the defendant, for the purchase therewith from said corporation of ten shares of said stock, if he, the defendant, would make and deliver to said Barton his, the defendant's, promissory note for \$1,000 payable to said Barton's order on demand, with interest at eight per cent per annum, and would assign and make over to said Barton as collateral security for such loan all of the defendant's said forty-two shares of said stock, together with the said additional ten shares proposed to be bought with the money so to be loaned by said Barton; that the defendant, then having entire confidence in the good will, good faith, and integrity of said Rice, consented to his said proposal, and thereupon made his promissory note of the tenor

as aforesaid, and assigned in blank his certificate of said forty-two shares of said stock, together with a certificate, in the defendant's name, of ten additional shares of said stock; that the defendant did not then, nor until long afterwards, personally know the said Barton, and did not see him or have any communication with him during the said transaction; that the defendant deposited and intrusted his said promissory note, and his said certificates of stock assigned in blank as aforesaid, in the hands either of said Rice or of William I. Holmes, the son-in-law of said Rice, and then the treasurer of said corporation, with the understanding and expectation that the said note would be indorsed by said Rice, and delivered by him, together with said certificates of stock, to said Barton, upon the payment and delivery by said Barton of said sum of \$1,000.

"And the defendant says, that he never received any money in his own hands for his said promissory note, and never received any consideration therefor except as aforesaid; that said certificate of said ten shares of stock was never in the defendant's hands or possession, except momentarily, for the time required for the defendant to sign his name to an assignment thereof, as aforesaid, and he does not know of his personal knowledge whether said \$1,000 was ever received by said corporation for said ten shares of stock. And the defendant says that thereafter he paid into the hands either of said Rice or of said Holmes the money payable as interest accruing upon said note, with the understanding and expectation that the same would be paid to said Barton by said Rice or said Holmes.

"And further answering, the defendant admits that an action was brought against him in this court, at the July term thereof in the year 1879, in the name of said Barton as plaintiff, upon said promissory note, in which action the said plaintiff recovered a judgment and took out an execution against the defendant for the sum of \$1,113.33, as alleged in the plaintiff's declaration in the action to which this answer is made. And this defendant says, that when said action was brought, at said July term, 1879, and during all the pendency thereof, and long afterwards, he understood and believed it was brought by said Barton in his own right and interest; that this defendant then believed said Barton was the holder and owner of said note;

that it was unpaid; that said Barton had the legal right to maintain said action, and that no defence thereto was open to the defendant; that the defendant consequently did not enter any appearance in or set up any defence to said action, and in the absence of such appearance or defence said action was defaulted, and judgment entered as aforesaid.

“ And this defendant says, that within the last ten days prior to the filing of this answer he has learned for the first time the facts hereinafter set forth and alleged, and hereby made a part of this answer, to wit:— 1. That long prior to the commencement of said action of July term, 1879, the said Barton had received from said Rice payment in full of said note, and the said Barton had no cause of action whatever against this defendant at the time said action was brought and said judgment recovered thereon. 2. That said Barton never assigned said judgment to said Rice. 3. That said execution has never been returned. 4. That said certificates of stock were never delivered to said Barton, and were never held by him as collateral security for said note. 5. That prior to September, 1878, without the knowledge or consent of this defendant, all of the fifty-two shares of said stock, the certificates of which this defendant had indorsed in blank as aforesaid for the intended security of said Barton as aforesaid, were transferred, and new certificates thereof issued to said Rice, whereby he appeared and represented himself to be the actual and absolute owner thereof.

“ And, further answering, this defendant says no demand was ever made upon him for the payment of said note by said Barton, or by any other person, prior to the commencement of said action of July term, 1879, and no notice was ever given to him by said Barton, nor by any other person, that his said stock was to be sold, or that it had been sold, for default in the payment of said note; that this defendant has never received any proceeds of sale of said stock, nor any statement or account of such sale from any person; that he has never authorized or ratified any sale or any disposition of said stock, or any of it, except under proper legal forms and conditions by the said Barton, as collateral security for said note, and he has never in any way received any consideration, payment, or equivalent therefor except as aforesaid; that, to the best of his information and belief, said

fifty-two shares of stock have an actual value of not less than \$5,000; that it is not equitable or just that said Rice should have and retain all of this defendant's said stock, including said ten shares, for payment of which said note was given, and still seek to recover of the defendant, in addition thereto, the full amount of said note, and the defendant claims and prays for all his rights in equity in the premises. And defendant further prays that the plaintiff's writ may be abated."

At the trial in the Superior Court, before *Pitman, J.*, after the pleadings were read, the judge was of opinion, and ruled, that the answer set forth no valid and sufficient defence to the action, and ordered a verdict for the plaintiff, and reported the case for the determination of this court.

It appeared at the trial that the judgment was recovered upon a demand note for \$1,000, dated October 18, 1873, signed by Radclyffe, payable to Barton or order, and indorsed by Rice before its delivery.

If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial was to be ordered, or such other disposition made of the case as might be deemed proper.

H. Lougee & F. P. Mayee, for the plaintiff.

G. H. Kingsbury & W. C. Harriman, for the defendant.

DEVENS, J. The defendant, in answer to the action brought in the name of the plaintiff, but for the benefit of Rice as assignee thereof, upon a judgment obtained by the plaintiff against him, relies upon the St. of 1883, c. 223, § 14. The first clause of this section provides that "in actions at law in the said courts, the defendant shall be entitled to allege as a defence any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action, or against a judgment obtained by the plaintiff in such action."

This answer alleges that, at the time the judgment in the original suit was obtained, the note there sued, which was signed by him, and upon which Rice was either co-promisor or indorser, had been actually paid by Rice, as the plaintiff well knew. It further alleges that the judgment had not been assigned to Rice, and that Rice had held, as collateral security, fifty-two shares of stock intended to be transferred to the nominal plaintiff, which in fact had never been transferred,

but which had been wrongfully converted by Rice to his own use, and thus that it would be inequitable and unjust that the judgment against the defendant upon the note should be collected from him. The purpose of the statute was not to create any new equitable defences in addition to those already existing, but to permit a defendant in an action at law to avail himself of those which were recognized by courts of equity, and thus relieve him from the necessity of initiating a new procedure in order to obtain the benefit of them. That a defence should be established under it, such defence must be one within the rules and principles of equity jurisprudence.

A court of equity will interfere, undoubtedly, to restrain a party from executing a judgment when facts appear showing that it would be against conscience that he should do so, of which facts the injured party could not have availed himself in a court of law, or of which he might have availed himself, but which he had been prevented from doing by fraud or accident, unmixed with any fraud or negligence in himself or his agents. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332. *Hendrickson v. Hinckley*, 17 How. 443. *Embry v. Palmer*, 107 U. S. 3. The defendant, in now asserting that the note on which judgment was recovered against him was then paid, presents no different inquiry from that which was involved in the original suit. The plaintiff then asserted the note to be unpaid. He practised no fraud, and if this assertion was untrue, the defendant had then the opportunity to controvert it, as it was the precise issue in the case. Nor is there anything to indicate that it would be unconscionable that the plaintiff should enforce his judgment for the benefit of Rice. The note on which it was founded was given by the defendant, on full consideration, which he actually received, although he transferred it as collateral security immediately thereafter. He made no answer or appearance in the cause, and was defaulted. It was his own duty to have paid the note, and he had not done so. Even if the note had actually been paid by the indorser, so that an action should more properly have been brought by him, rather than by the holder, for money advanced for the payment of the note, of which the defendant has only recently become aware, he shows no reason why, equitably, this judgment should not

be enforced. He was subjected to no deception, he made no inquiries, and took no pains in the matter, and he has lost no rights unless he has been deprived of some defence which he might make in a suit brought by Rice in his own name, which we will presently consider.

The answer that Barton, the nominal plaintiff, has never assigned his judgment to Rice, and that the defendant is entitled, equitably, to a set-off against Rice, are apparently inconsistent. If there was no such assignment, there can be no off-sets or equities between Rice and the defendant to be considered, and against Barton the defendant asserts no defence except that which we have just considered. As the plaintiff alleges that he has assigned the judgment to Rice, and that this suit is brought for Rice's benefit, we consider whether the defendant now presents any off-set or defence which should prevent Rice from recovering. He avers that Rice received from him fifty-two shares of stock, including the ten shares for the purchase of which the loan was made, which were to be delivered to Barton as collateral security for the payment of the note; that in fact they never were delivered to Barton, but that Rice retained them and wrongfully surrendered the certificates of this stock, which had been indorsed in blank by the defendant, and took out new certificates in his own name. Inasmuch as the note was to be paid by the defendant, if the stock were still held as collateral security for such payment, and was delivered for this purpose to Rice, the defendant, before paying the judgment, has no right to demand possession of it nor an accounting for it. *Fisher v. Fisher*, 98 Mass. 303. If Rice has wrongfully sold it, the plaintiff may have a claim for damages against him, but it is one which before liquidation he cannot set off against the judgment on the note. A claim for unliquidated damages, it is well settled, is not the subject of a set-off. *Loring v. Otis*, 7 Gray, 563. *Barry v. Cavanagh*, 127 Mass. 394, and 130 Mass. 436.

The defendant, in his answer, avers that "it is not equitable or just that said Rice should have and retain all of this defendant's said stock, including said ten shares, for payment of which said note was given, and still seek to recover of the defendant, in addition thereto, the full amount of said note, and the

defendant claims and prays for all his rights in equity in the premises." But he does not allege that Rice is not entirely responsible, so that he can recover the stock, or full damages therefor, if it is not returned to him when the judgment on the note which it was his duty to pay has been paid, nor does he here tender the amount due upon it so as to entitle himself to a return of the collateral security. *Judgment on the verdict.*

THOMAS C. BOND vs. AUGUSTUS B. ENDICOTT.

Suffolk. March 20, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Conversion — Evidence — Sheriff — Attachment — Fraudulent Conveyance.

In an action against a sheriff for the conversion of a horse, there was evidence of its sale and delivery to the plaintiff by an intestate, who owned it. The defendant, who justified under an attachment of the horse in an action by the intestate's administratrix against his housekeeper for its conversion, after evidence tending to show that the horse was never delivered, and remained in the intestate's possession till his death, offered evidence that the housekeeper thereafter wrongfully took possession of the horse, claiming to be the owner, but had no title beyond that of an intermeddler; and that the sale to the plaintiff was in fraud of the intestate's creditors. *Held*, that the evidence offered was rightly excluded.

TORT against the sheriff of Norfolk for the conversion of a horse.

At the trial in the Superior Court, before *Dunbar, J.*, the defendant denied that the plaintiff was the owner of the horse, and justified under a writ of Caroline T. Norris, administratrix, against Anna L. Wiswell, by virtue of which the horse was attached as her property by a deputy of his.

The plaintiff introduced evidence tending to show that he bought the horse of George W. Norris, and paid him for it on April 25, 1881, and received a bill of sale of the horse, which was then in a boarding stable; that the next day there was a delivery of the horse at the stable, and afterwards the horse was at times driven by the plaintiff; and that at the time of the

attachment the defendant's deputy was notified that the horse was the property of the plaintiff, and that he was forbidden by the plaintiff's wife to remove it.

The defendant introduced evidence tending to show that the horse was in the possession and control of George W. up to the time of his death, in August, 1887; that there had never been any delivery of the horse to the plaintiff; and that if the plaintiff ever drove the horse, he drove it as the servant of George W., and at his direction.

The defendant then offered to show that at the time of the death of George W. the horse was in the stable of the house which he then occupied; that after his death Wiswell, who was his housekeeper, remained in the house, and claimed ownership of the horse, but had no title or claim to the horse except such as a person might acquire who takes possession and control, without authority, of goods after the death of the owner, and who continues such possession and control after notice of the appointment of a special administrator, and refuses to deliver them on demand, and is sued for the conversion of such goods; that Caroline T. was appointed special administratrix, and brought an action against Wiswell for the conversion of personal property, including the horse in question, in which action the horse was attached as Wiswell's property and sold by the deputy; and that George W. when he made the sale, in 1881, was insolvent, apprehended attachments, and the sale was fraudulent as against creditors.

The judge excluded the evidence thus offered.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. Prentiss, for the defendant.

A. V. Lynde & W. P. Harding, for the plaintiff.

FIELD, J. The plaintiff's claim was that the horse had been sold and delivered to him by George W. Norris, who was the owner, and that he had paid the price to Norris, and had received from him a bill of sale. The defendant was permitted to introduce evidence tending to contradict this, and to show that the horse remained in the possession of Norris until his death, and that the horse had never been delivered to the plaintiff. The evidence which the defendant offered, and which was

excluded, was in substance that Anna L. Wiswell, who was the housekeeper of Norris at the time of his death, wrongfully obtained possession of the horse after his death, and claimed to be the owner, but that she had no title beyond that of an intermeddler with the goods of a deceased person; that Caroline T. Norris had been appointed administratrix of the estate of George W. Norris and had brought suit against Wiswell for a conversion of the horse and other property, and that the defendant's deputy had attached the horse in that suit as the property of Wiswell. The defendant also offered to show that the sale by Norris to the plaintiff was fraudulent as against creditors. This evidence did not tend to show any title in Wiswell, or tend to disprove the plaintiff's title. The defendant, in justifying under an attachment of the horse as the property of Wiswell, does not stand in the place of a creditor of the estate of George W. Norris, and is not entitled to avoid sales made by him in fraud of his creditors.

Exceptions overruled.

GARDNER C. HAWKINS vs. JOHN C. GRAHAM.

Suffolk. March 22, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Contract — "Satisfactory Completion" of Subject Matter.

A contract in writing recited that a person agreed with a mill-owner to furnish and set up a system of heating in his mill according to tests and requirements described, and for a price to be paid upon its "satisfactory completion"; if such person was unable properly to heat the mill in accordance "with the requirements," and was unable to do so within ten days after notice of that fact, he was to remove the system at his own expense, it being distinctly understood that the providing of the entire system was to be done at his own risk absolutely; "in the event of the system proving satisfactory and conforming with all the requirements," the price was to be paid to him "after such acknowledgment has been made by the owner or the work demonstrated." Held, that the satisfactoriness of the system was to be determined, not according to the private taste and liking of the mill-owner, but by the mind of a reasonable man, and by the means afforded by the contract.

CONTRACT for breach of an agreement in writing, which was as follows:

“Philadelphia, December 21, 1885.

“Mr. John C. Graham:—

“I do hereby agree that for and in consideration of the sum of fifteen hundred and seventy-five (1,575) dollars, to be paid me upon the satisfactory completion of the following system of heating to be established in your new mills, located at the N. E. cor. of 19th and Hamilton Streets, Philadelphia, Penn., as follows, viz.: to furnish and set up (no foundations included) in complete and first-class working order, one steam fan, having an engine affixed thereto of $6\frac{1}{2} \times 7$ inch cylinder of first-class workmanship and material, together with a heater containing a sufficient and ample quantity of one-inch wrought-iron steam piping, properly applied on the inside of a wrought-iron casing, all of which to be erected in proper working order in such portions of the buildings, where found most convenient for the establishment and where directed by yourself.

“The system of heating to be entirely dependent upon the exhaust steam from your engine at an indication of 40 H. P., and to be of such construction as to readily as well as easily heat or raise the temperature, at any point or portion of the entire buildings into which heat from said heater may be conducted, to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced; and further, that the application of said system is to avoid any back pressure upon the mill engine, or not increase any that may exist when my heater is attached, and that the erection and construction of the vertical pipes (we have arranged for one line of pipes from the vertical standpipes already 12' decimeters and shall not attach any more unless found necessary, as explained to you, they being the only kind required) shall be executed in accordance with the plans and specifications prepared by myself and under my personal supervision and direction.

“Further, the entire work is to be finished within eighteen (18) days from date of this contract, either by permanent or temporary means; if temporary, no extra charge whatsoever to be made, excepting such charges on the temporary machine as regards freight to and from our works, and clearing up. It

is further declared, and distinctly understood, that in the event of my not being able to properly heat every portion of the buildings as hereinbefore provided for, and in accordance with the requirements as above set forth, upon a ten (10) days' notice from yourself, to the effect that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter, I shall and will at my own expense remove all the machines and appurtenances belonging to the system, leaving the entire mill in a condition equal to that prior to the introduction of the same. In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of \$1,575 as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated.

“Gardner C. Hawkins.”

At the trial in the Superior Court, before *Brigham*, C. J., there was evidence that the plaintiff made the offer contained in the above agreement, and that the defendant accepted such offer.

The defendant contended that all the words of the contract were to be taken into consideration in its interpretation; that, in addition to the other requirements of the contract, the system of heating must prove satisfactory to the defendant; and that not till the satisfactory completion of the system and its proving satisfactory to the defendant was anything due to the plaintiff; and the defendant offered evidence, not only that the system would not and did not do the heating as guaranteed, but that it did not prove satisfactory to the defendant, and that it had not been completed satisfactorily to him, and such acknowledgment had never been made by him.

The judge ruled that this contract did not come within the scope of the case of *Brown v. Foster*, 113 Mass. 136, and similar cases, and that if the plaintiff had fulfilled his contract in the other particulars required, he was entitled to recover, notwithstanding the dissatisfaction of the defendant; that under the contract the plaintiff was not bound to make the system satisfactory to the defendant, and that evidence on that point was

immaterial; and that the trial should proceed on the theory that the satisfaction of the defendant was substantially eliminated from the case.

The plaintiff's evidence showed that the temperature of the different stories of the defendant's mill, which was one hundred and ninety-six feet long by fifty feet wide, and seventy-five feet high, varied, and that the temperature near where the hot air entered the rooms was higher by several degrees, in some instances as much as ten degrees, than in the more remote portions of the rooms, the hot air being introduced into the rooms at only one place, at the end of each room.

The judge gave no instructions to the jury on the question of satisfaction.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. Hemenway & F. L. Washburn, for the defendant.

S. Lincoln, for the plaintiff.

HOLMES, J. The only question in this case is whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. Such agreements usually are construed, not as making the defendant's declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts, (*Hunt v. Livermore*, 5 Pick. 395, 397,) but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases eager sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved. *Brown v. Foster*, 118 Mass. 186. *Gibson v. Cranage*, 39 Mich. 49. *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich. 565. *Zaleski v. Clark*, 44 Conn. 218. *McClure Bros. v. Briggs*, 58 Vt. 82. *Exhaust Ventilator Co. v. Chicago, Milwaukee, & St. Paul Railway*, 66 Wis. 218. *Seeley v. Welles*, 120 Penn. St. 69. *Singerly v. Thayer*, 108 Penn. St. 291. *Andrews v. Belfield*, 2 C. B. (N. S.) 779.

Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the

will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant. *Sloan v. Hayden*, 110 Mass. 141, 143. *Braunstein v. Accidental Death Ins. Co.* 1 B. & S. 782, 799. *Dallman v. King*, 4 Bing. N. C. 105.

By the written proposition which was accepted by the defendant, the plaintiff agrees, "in consideration of the sum of fifteen hundred and seventy-five dollars, to be paid me upon the satisfactory completion of the following system of heating . . . in your new mills, . . . to furnish and set up, . . . in complete and first-class working order," certain things. Then follow conditions, tests, and other undertakings. Then "it is further declared . . . that in the event of my not being able to properly heat every portion of the buildings . . . in accordance with the requirements as above set forth," upon ten days' notice "that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter," the plaintiff will remove the machines at his own expense. "In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of fifteen hundred and seventy-five dollars as above provided for to be paid me, after such acknowledgment has been made by the owner or the work demonstrated."

The last words "or the work demonstrated," offer an alternative to the owner's acknowledgment. They imply, that, if the work is demonstrated, it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, "and conforming with all the requirements," tend the same way. The ten days' notice contemplated is not a notice that the owner is dissatisfied, but that the buildings "are not being properly and sufficiently heated," and the right to give it is conditioned upon the plaintiff's "not being able to properly heat every portion of the buildings," etc. Taking these phrases with the test prescribed, that the system is "to readily as well as easily heat or raise the temperature at any point . . .

to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced," etc., we are of opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant.

Exceptions overruled.

BRIDGET F. MCGAFFIGAN vs. CITY OF BOSTON.

Suffolk. March 22, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Personal Injuries — Defective Sidewalk — Cover of Coal-Hole — New Trial.

At the trial of an action against a city for an injury caused to a traveller by falling into a coal-hole in the sidewalk of a highway, there was evidence that the cover to the hole was loose, and that the stone into which it was fitted was "rounded underneath," so that the cover would tip up or turn over when stepped on, and this was apparent from the street; that, although the cover could be securely fastened by a bolt on the inside, it was usually left unfastened; that this condition of the coal-hole and cover had existed for a considerable time and was known to a police officer of the city, who had reported the fact at his station; and that half an hour before the accident the cover had been removed by one rightfully putting in coal, who upon replacing it neglected to fasten it on the inside. *Held*, that there was evidence of a defect in the sidewalk, of which the city might have had notice by the exercise of reasonable care and diligence, even if the police officer's knowledge was not of itself notice to the city.

TORT for personal injuries occasioned to the plaintiff by an alleged defect in a sidewalk of Thacher Street, a highway in Boston. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows.

There was evidence that the plaintiff, on November 22, 1884, while travelling along the sidewalk in question, fell into a coal-hole, the cover of which, not being fastened from the inside as it was constructed and intended to be fastened, tipped when she stepped upon it, and permitted the plaintiff to fall in, causing severe injuries. There was also evidence that when the cover

was fastened on the inside it was safe and secure, and could not be tipped or pushed off, but that at the time of the accident it was not so fastened; that from half-past five to six o'clock P. M. of the day of the accident the coal-hole cover had been removed for the purpose of taking in coal through the hole by an occupant of the adjoining premises having the lawful use of the same, and that the cover was replaced by the person putting in the coal, who neglected to fasten it on the inside; and that the plaintiff received the injuries half an hour later, at half-past six o'clock.

Mrs. McLaughlin, a witness called by the plaintiff, testified that she saw the cover three days before the accident happened; that at that time she was going down Thacher Street with a Mrs. Feeley, who stepped her foot on the middle of the cover of the coal-hole, and it tipped right over; and that one Alley was in front of them, whose attention the witness called to the cover.

Alley testified that at the time of the accident he was a police officer of the defendant city; that previous to its occurrence he had several times examined the coal-hole and the cover; that a day or two before the accident his attention was especially called to it by Mrs. McLaughlin; that he had found the cover loose previously, and reported it at the station; that at the time Mrs. McLaughlin drew his attention to it he examined it, and, as he stepped on either edge of it, it would turn over; that it fitted nicely in the sidewalk, but was rounded underneath so that it would balance and tip up; and that he took a note of it and reported it again. On cross examination, Alley testified that "whatever part you stepped on, it tipped up, it was loose; it fitted snugly round the top, but the under part was worn away"; that "it was a thin cover; the recess was deep enough in the stone to fit it in smoothly"; and in reply to the question, "Was not the only trouble with the cover that the occupants neglected to put a broomstick or bolt through to fasten it?" the witness said, "That is the way I understood it."

The plaintiff testified, on cross examination, that she saw the cover the Wednesday before the accident, and walked over it. The question was then asked, "You saw that it was all right then?" and she answered, "Yes, sir."

There was no evidence that any officer of the city had, between the time of this using of the coal-hole and the time of the plaintiff's injury, notice of such want of fastening, unless the above evidence shows such notice.

The defendant asked the judge to rule on this evidence that the plaintiff could not recover; but the judge refused so to rule, and ruled that the case should go to the jury, and gave them, among others, the following instructions:

"This woman claims that she has received an injury by a defect which the city of Boston by reasonable care and diligence could remedy, so that she would have received no injury from it; and that the city of Boston either knew that there was a defect, or, fulfilling its duty reasonably, it might have known that defect. . . . This case has this peculiarity: the neglect of the city which is imputed in this case may, perhaps, be as well described by the word 'non-interference' as by any other word. A portion of the highways, the sidewalk, in a great city, is more or less undermined for the convenience of abutters where land is scarce and valuable, in order to obtain access to the basements or the cellars of houses along the street. Coal-holes are tolerated, if not licensed, everywhere. . . .

"If the defect was solely the want of fastening, then the question arises whether the city knew that it was unfastened, through its officers. That might be known, if it was visible to an officer patrolling that sidewalk, that it was loose for the want of fastening. It might receive notice by an officer who had seen that a passer by, a person passing over it, had displaced it so as to indicate that the proper fastening was not applied to it. It has been held that it is not the reasonable duty of the city to examine every coal-hole within its limits, every day or every hour, to see whether it is fastened as it ought to be on the inner side; but if on the outside there are appearances of looseness and insecurity which are obvious to the officers of the city as they patrol that sidewalk, that those appearances would be notice which might require some application of care. If the officers actually saw that the cover was in a loose condition for the want of fastening, that would be notice of the condition of things then. The practical inquiry is, whether at the time of the happening of this event the city had knowledge of a con-

dition of things there which made that sidewalk unsafe and inconvenient for public travel, or whether, in the exercise of what might be reasonably required of the city as its duty, and what it was practicable for the city to do, it could have ascertained that condition of things.

"The only defect for which the jury can find the city liable consists in the coal-hole cover not having been fastened on the inside at the time of the injury; and if the jury find that the city had no notice of this fact, or could not have had notice of the defect, or could not have prevented the injury by reasonable care on its part, then the defendant will be entitled to a verdict.

"The plaintiff says, Here was the defect, the city saw it, knew its effect upon the passers by, and so it cannot be said that it was a defect for which the city was not responsible. It is claimed on the part of the city, however, that the condition of this coal-hole is one of those things which it cannot be reasonably required of the city to know, simply because it is impossible. But the question of means of knowledge and the care and diligence necessary to obtain knowledge is, of course, immaterial, if the jury should find that the defective condition of this coal-hole was visible and apparent, or was specifically called to the attention of an officer of the city, and he saw the effect of it."

The jury returned a verdict for the plaintiff in the sum of \$4,000; and the defendant alleged exceptions.

After verdict, the defendant filed a motion for a new trial and to set aside the verdict, for the reasons, — "1. That the verdict was not in accordance with the evidence in the case and the instructions given by the court. 2. That the jury in their verdict did not conform their decision to the instructions given them by the court in applying the law to the evidence given in this case." The judge overruled the motion; and the defendant alleged exceptions.

A. J. Bailey, for the defendant.

J. D. Long, for the plaintiff.

FIELD, J. The city is required to keep its streets reasonably safe and convenient for travellers, (Pub. Sts. c. 52, § 1,) and is liable in damages for any injury received through a defect in a

street which might have been remedied by reasonable care and diligence on its part, if it had reasonable notice of the defect, or might have had notice of it "by the exercise of proper care and diligence." Pub. Sts. c. 52, § 18. The city of Boston by its ordinances authorizes the board of aldermen to permit the construction of coal-holes under the streets, and to prescribe the manner in which they shall be constructed and covered. Revised Ordinances of 1885, c. 28, §§ 16, 17. It does not appear that the covers of coal-holes cannot be so constructed that they will not slip off or turn up, in any ordinary use of the streets, even if they are not fastened down on the inside. It may be impracticable for the city, if it permits coal-holes in the streets at all, to guard against the possibility of the coal-holes being left open, but it is not shown to be impracticable for the city to require a covering of such a kind that when the cover is shut the street is reasonably safe although the cover is not fastened on the inside.

In *Hanscom v. Boston*, 141 Mass. 242, "there was no evidence that the coal-hole and cover were improperly constructed, or that there was anything in the appearance of the coal-hole or cover that indicated any defect, or that it had ever before been out of place, and no evidence that the officers of the city had any knowledge that the cover was not fastened down on the inside." And the court held that there was no evidence that the city had reasonable notice of any defect, or might have had notice of it, or might have remedied it, by the exercise of reasonable care and diligence.

In the case at bar there was evidence that the cover was loose, and that the stone into which it was fitted was "rounded underneath," so that the cover would "balance and tip up," or turn over when stepped on; that this was apparent from the street, and that, although the cover would be secure if fastened by a broomstick or bolt on the inside, it was usually left unfastened; and that this condition of the coal-hole and cover had existed for a considerable time, and was known to a police officer of the city who had "reported it at the station." We think that this was evidence of a defect of which the city might have had notice by the exercise of proper care and diligence, even if the knowledge of the police officer was not in itself

notice to the city, upon which we express no opinion. See *Donaldson v. Boston*, 16 Gray, 508; *Post v. Boston*, 141 Mass. 189; *Blake v. Lowell*, 143 Mass. 296.

The fact that, half an hour before the plaintiff was injured, "the coal-hole cover had been removed for the purpose of taking in coal through the hole by an occupant of the premises having the lawful use of the same, and that the cover was replaced by the person putting in the coal, who neglected to fasten it on the inside," is not conclusive against the right of the plaintiff to maintain her action. The evidence was that the defect in the condition of the coal-hole and cover was permanent, and the neglect of the occupant of the premises to fasten the cover on the inside was habitual, and it does not appear that the person putting in the coal did not leave the coal-hole as securely covered as he found it. We see no error in the rulings and instructions of the court, and we cannot say, as matter of law, that a new trial should have been granted.

Exceptions overruled.

MICHAEL FOLEY vs. PETTEE MACHINE WORKS.

Suffolk. March 22, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Personal Injuries — Negligence — Master and Servant — Risk of Employment — Employer's Liability Act — Notice — Inspection of Factories — Guarding of Dangerous Machinery.

An experienced machinist, injured by accidentally putting his hand into uncovered gearing, which is in plain sight and by which the power is transmitted to the machine upon which he is at work, cannot recover from his employer for his injuries; and the employer is not negligent in failing to give particular instructions to such machinist as to the risks of the employment.

An employer of labor is not liable, under the Pub. Sts. c. 104, § 22, to a criminal prosecution, or to an action by an employee, for a violation of § 13, relating to the guarding of dangerous machinery, until the notice required by § 22 has been given to him by an inspector of buildings.

TORT for personal injuries occasioned to the plaintiff while in the defendant's employment. At the trial in the Superior

Court, before *Sherman, J.*, there was evidence tending to prove the following facts.

The defendant corporation was engaged in the manufacture of machinery, and on April 27, 1888, the plaintiff, by direction of the defendant's foreman, was at work on a drilling machine in its shop. The machine was run by power transmitted from a shaft by means of bevelled gears, and was started and stopped by means of a lever called a shipper handle, the end of which while the machine was in motion was but two or three inches distant from the gears, and as the plaintiff faced the machine just above the level of his head to the left. These gears at the time were not covered or protected in any way, and together with the shipper handle were plainly in view.

The plaintiff was engaged in drilling a hole through a heavy iron casting called a "card-side," which was six or seven feet in length, and about two and a half in breadth. This card-side lay upon a table beneath the drill, resting upon its side, while he held it in position assisted by one Mullen, a fellow servant. The drill, which had partially pierced the casting, became caught, causing the casting to wobble. The plaintiff braced his leg up against it, but as his leg was in danger of being broken, and his attention was fixed upon the casting, he put out his left hand without looking to take hold of the shipper handle and stop the machine, when it was caught in the gears and the injuries received.

The plaintiff had worked about five years for the defendant, during three years of which time he had worked upon machines run by power. He had worked on various machines, all of which were started and stopped in the same way as the drilling machine. He had started or stopped the drill about once every fifteen minutes by means of this shipper handle, to which previously he had been able to give his attention; but at the time of the accident he was in danger of breaking his leg, and "could not keep his eyes on two places."

The plaintiff had been at work upon the drilling machine about two weeks, and had never before worked on one of that make. During those two weeks his work on the machine had consisted in drilling small castings which did not wobble. He had been at work upon the card-sides four hours when the acci-

dent happened. During the four hours in which the plaintiff had been at work upon the card-side castings he had drilled nine, and the one on which he was at work when injured was the tenth. He had received no instructions as to how the machine should be run; and no one had ever said anything to him about it, and there was no device about the table to prevent wobbling. Mullen had worked on the same machine at intervals during the previous year.

The plaintiff offered to show, by the testimony of one Coon, a member of the district police and an inspector of factories and public buildings, that as such inspector he had visited the defendant's shop about a year before the accident; that at that time the machine upon which the plaintiff was injured was not in the shop; that he visited the premises about three days after the accident occurred, and the gears were then covered, and he was not informed of the accident by the defendant or any of its employees; that the defendant had not sent to the chief of the district police a written notice of the accident within the time required by the St. of 1886, c. 260, § 1; that in his opinion the gears in which the plaintiff's hand was caught were so placed as to be dangerous to persons employed in the defendant's shop while engaged in their ordinary duties; and that he had not communicated this opinion to the defendant, nor to any one.

It was admitted that notice of the accident was not given to the defendant by the plaintiff other than by bringing this action.

Upon these facts, the defendant requested the judge to rule that the plaintiff could not recover. The judge so ruled, and ordered a verdict for the defendant, and reported the case for the determination of this court.

If the ruling was correct, the verdict was to stand; otherwise, a new trial was to be ordered.

J. A. Maxwell & *J. D. McLaughlin*, for the plaintiff.

H. N. Shepard, for the defendant.

MORTON, C. J. It is admitted that the plaintiff cannot recover under the St. of 1887, c. 270, because he failed to give notice of his injury to the defendant, as required by § 3 of that statute. He claims that he is entitled to maintain this action at common law.

If we assume, without deciding, that the statute does not affect the liability of an employer which existed at common law before its passage, yet we are of opinion that the plaintiff is not entitled to recover. He was a man of mature years, accustomed to the use and management of machinery, and had worked upon machinery for the defendant for five years. He was injured by accidentally putting his hand into a pair of bevelled gears or cog-wheels, by which the power was transferred to a drill which he was using. This gearing was uncovered, but it was in plain sight.

The defendant was not negligent in failing to give particular instructions to the plaintiff. Such instructions to an experienced machinist would be useless. If the machinery was dangerous by reason of being uncovered, the plaintiff knew this danger as fully as any man could know it. The case clearly falls within the numerous decisions in which it has been held that, if an employee enters into an employment in which there are obvious and known dangers, he takes the risk of them, and cannot recover because the machinery might be made less dangerous by being covered. *Gilbert v. Guild*, 144 Mass. 601, and cases cited. *Goodnow v. Walpole Emery Mills*, 146 Mass. 261.

The plaintiff claims that the defendant is liable under the Pub. Sts. c. 104, § 22. But by the just construction of this chapter a person or corporation cannot be said to be guilty of a violation of § 13, so as to be liable to a criminal prosecution, or to an action by an employee, until notice has been given to him by an inspector, as required in § 22.

Judgment on the verdict.

HANNAH HOLLORAN vs. ELLEN HOLLORAN.

Middlesex. March 26, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Writ of Entry — Adverse Possession — Fence — Title.

At the trial of a writ of entry brought by a lot owner against an adjoining owner to recover an intervening strip of land, there was evidence that a fence, erected as a boundary between the lots, had existed more than twenty years continuously, being once rebuilt by a former owner of the tenant's lot; that the fence was upon the true boundary line between the lots, as claimed by the demandant, and included the strip with his lot; and that the strip had been used by the demandant's grantors and himself, owners of that lot, for more than twenty years continuously, openly, adversely, and under a claim of right. *Held*, that a finding was warranted that the demandant had acquired title by adverse possession up to the line of the fence, irrespective of the original boundary line.

WRIT OF ENTRY, dated March 15, 1888, to recover a parcel of land in Somerville. Plea, *nul disseisin*. Trial in the Superior Court, before *Bishop, J.*, who allowed a bill of exceptions, in substance as follows.

Evidence was introduced tending to prove the following facts.

The demanded premises consisted of a strip of land fifty-five hundredths of a foot wide and one hundred and four feet long, situate on the westerly side of the demandant's dwelling-houses, on the northerly side of Linwood Street in Somerville. One Binney made a plan of house lots in Somerville, dated April, 1847, which was duly recorded, and shortly afterwards the owner of such lots conveyed to the demandant's grantor lot No. 4 on such plan, and lot No. 3 west of it to the tenant's grantor, describing them according to the plan. Subsequently one Mason made another plan of the same lots and adjoining land, dated October, 1849, which plan was duly recorded, and coincided with the Binney plan in all respects as regards such lots. The Mason plan showed a "stone bound" on such adjoining land, and Walnut Street, a street running at about right angles with Linwood Street, and parallel with the side lines of the lots and a fence on Walnut Street. There was no reference to the Mason plan, or to the "stone bound," in any of the deeds.

The demandant offered evidence tending to prove that about the year 1860 a fence was erected as a boundary line between lots Nos. 3 and 4; that thereafterwards the fence existed more than twenty years continuously, and was once rebuilt by the owner of lot No. 3; that the fence was upon the line claimed by the demandant to be the true boundary line between the lots Nos. 3 and 4, and that from and after about 1860 the demanded premises had been used and occupied by her grantors and herself, owners of lot No. 4, for more than twenty years continuously, openly, adversely, and under a claim of right.

The tenant, in addition to evidence tending to contradict that of the demandant, offered evidence tending to prove that, measuring from the "stone bound" and from the fence on Walnut Street, the true boundary line between lots Nos. 3 and 4 was fifty-five hundredths of a foot easterly from the line claimed by the demandant, and so that the demanded premises were part and parcel of lot No. 3, and belonged to the tenant.

The tenant requested the judge to rule as follows:

"1. That the jury would not be justified in law to find the line of the fences described by the witnesses for the demandant as the true division line between lots Nos. 3 and 4 on the said Binney plan, in the absence of any evidence establishing them as such division line between said lots by agreement, or in some other manner that the law would allow or recognize; and that the lapse of twenty years during which the fences testified to had existed would not, and could not, establish any different line as the division line between the parties' land than that which was established as the true division line between said lots in accordance with said plans from a survey made by the civil engineers, starting from the stone bound and the face of the fence on Walnut Street, as testified to, which secured the full quantity of land in lots Nos. 3 and 4 to the parties to this suit, in accordance with said plans.

"2. That no such use of the fence or fences for a period of over twenty years between lots Nos. 3 and 4 on said plan, as testified to in this case, can in law establish the division line or boundary between said lots against the true line as claimed by the tenant, which said plans exhibit and the said surveyors confirm, and which shows each party to this action to be

already in possession of the respective lot of land to which each is entitled in the plans aforesaid.

"3. That the Binney plan referred to, and the surveys, which give the parties all the land to which they are entitled respectively, in law must govern, and that the verdict must be for the tenant.

"4. That known monuments must govern in the establishing of the division line between the two lots, and in determining the question at issue between the parties to this action, and that, as the stone bound and the fence on Walnut Street, these two monuments, existed as testified to by the two surveyors, and as surveys starting from either preserve the exact measurement and quantity of the land in each lot No. 3 and No. 4 on said plans, then it is for the consideration of the jury, and whether there can be set up any matter of the fence or fences, or boundary or claim as the boundary, as against those monuments in the absence of any agreement or dedication of or by the parties, as those monuments, or surveys from them, preserve the integrity and entirety of each lot on the said Binney plans, including the lots Nos. 3 and 4 thereon, and the boundaries of the same."

The judge declined so to rule, and instructed the jury, among other things, as follows:

"That they should consider and weigh the evidence as to the stone monument at the end of the row of lots, and the evidence as to the old fence by the side of Walnut Street; that these were two monuments, and the jury should consider the evidence as to them, and draw such inferences of fact from it respecting the true line between lots Nos. 3 and 4 as they found the evidence led to; that, on the other hand, there was testimony before the jury as to the existence of the fence between lots Nos. 3 and 4, as to how long it had been there, what its character was, and where it was; that they were to take that evidence also into consideration, and draw from it such inferences of fact as they found the evidence justified; that if they found that a fence established for the purpose of being a division line had existed between lots Nos. 3 and 4 for more than twenty years upon the line claimed by the demandant, or that a fence had existed there which was regarded during a period of more than twenty years by the

owners on one side and the other as a division line, and acquiesced in and treated by them as such, that would warrant the jury in finding that the line of said fence was the division line between the parties; that it was a question of fact for the jury, whether the fence had become such an established erection by its existence, and the adverse use of the adjoining parcel on the demandant's side, for more than twenty years continuously, openly, and under a claim of right, as to constitute the division line, and that it was a question of fact upon the whole evidence whether the division line was that indicated by measuring from the stone bound and the old fence on Walnut Street, or that indicated by the fence claimed to have been erected between lots Nos. 3 and 4."

The jury returned a verdict for the demandant; and the tenant alleged exceptions.

E. A. Alger, for the tenant.

W. S. Stearns & J. H. Butler, for the demandant.

FIELD, J. The writ is dated March 15, 1888. The exceptions recite that "the demandant offered evidence tending to prove that about the year 1860 a fence was erected as a boundary line between said lots Nos. 3 and 4; that thereafter said fence existed more than twenty years continuously, and was once rebuilt by the owner of lot No. 3; that said fence was upon the line claimed by the demandant to be the true boundary line between said lots Nos. 3 and 4, and that from and after about 1860 the demanded premises had been used and occupied by her grantors and herself, owners of lot No. 4, for more than twenty years continuously, openly, adversely, and under a claim of right." This was evidence, not only that the line of the fence was the true boundary line, but evidence of title in the demandant up to the line of the fence acquired by adverse possession. *Samuels v. Borrowscale*, 104 Mass. 207. *Coyle v. Cleary*, 116 Mass. 208. *Johnson v. Bean*, 119 Mass. 271.

The deeds of neither party refer to the Mason plan, or the stone bound, or the fence on Walnut Street, and therefore these are not monuments in the legal sense. The evidence concerning these was evidence for the jury, in connection with other evidence, upon the position of the original boundary line between the lots, and whatever the position of that line was, or

was found to be, there is nothing in the exceptions which should prevent the jury from finding that the demandant had acquired title by adverse possession up to the line of the fence, if they believed her evidence. The requests for rulings are somewhat obscure, but, as we understand them, they ought not to have been given, and no error is shown in the instructions given.

Exceptions overruled.

EDWARD M. SWETT & others vs. ALBERT G. THOMPSON.

Middlesex. March 26, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Equity Practice — Appeal — Chattel Mortgage by Remainderman.

The only question before this court, upon an appeal from the final decree of a justice of the Superior Court, sitting in equity, without a report of the evidence or of any of the facts found by him, is whether the decree is supported by the pleadings.

A mortgage of personal property, containing the usual covenants and given by one with a vested interest therein subject to an estate for life, will operate as an equitable assignment at least of such interest, which the mortgagee may enforce after the life tenant's death.

BILL IN EQUITY to cancel and set aside a mortgage of personal property given to the defendant by the plaintiffs Edward M. Swett and his wife, Mary A. Swett, to the latter of whom such property was bequeathed in trust for the benefit of the remaining plaintiff, Hannah E. Carter, during her life, with remainder to Mary A., under the will of Eliza E. E. W. Carter. In the Superior Court, *Bishop, J.*, made a decree dismissing the bill; and the plaintiffs appealed to this court. The facts appear in the opinion.

P. J. Hoar, for the plaintiffs.

G. H. Stevens, for the defendant.

MORTON, C. J. There is nothing before us on this appeal except the question whether the final decree is supported by the pleadings in the case. There is no report of the evidence, or of

any of the facts found. It is only open to the plaintiffs to claim that upon the pleadings they are, as matter of law, entitled to a decree in their favor. *Smith v. Townsend*, 109 Mass. 500. *Mason v. Lewis*, 115 Mass. 334, 335.

The bill is brought to set aside a mortgage of personal property, on the ground that the property was held by one of the mortgagors as a trustee, and therefore that they had no right to mortgage it, and also upon the ground that the mortgage was without consideration, and was obtained by misrepresentation and fraud. The answer denies the allegations of the want of consideration, and of misrepresentation and fraud. The Superior Court, "after full hearing, and argument of counsel," ordered that the bill be dismissed, and we must assume that these issues of fact were properly found against the plaintiffs. As to the allegations of the bill, that the property mortgaged was held in trust by Mary A. Swett, under the will of her sister, Eliza E. E. W. Carter, the answer in the thirteenth clause by implication admits their truth, and alleges that the property is still in the possession of Mary A. Swett, and that her *cestui que trust*, "Hannah E. Carter, has always enjoyed and is still enjoying the income and benefit from said property." We must assume that the Superior Court found that these allegations of the defendant are true.

The will of Eliza E. E. W. Carter gives all the remainder of her property, real and personal, to Mary A. Swett, "in trust to pay over the net income thereof to my father, Joseph Carter, and my mother, Hannah E. Carter, in her discretion, whenever they may need the same for their support and comfort, during their natural lives and to the survivor of them as long as he or she shall live, and at the decease of the surviving parent and of both my said parents then my said property and estate shall go, and I give, bequeath, and devise the same to my sister, the said Mary A. Swett, to her and her heirs and assigns forever." In case Mary A. Swett shall not be living at the death of the survivor of the parents, the property is given to the Kirk Street Congregational Church and Society of Lowell. Under this will Mary A. Swett took a vested interest in the property, in the nature of an equitable remainder, which she could transfer and assign.

The mortgage in question, though it cannot take full effect as a mortgage, will, at least in equity, operate to transfer to the defendant the interest of Mary A. Swett in the property described in it. He does not seek to enforce it so as to interfere with the execution of the trust under the will, but he has the right to hold it as an assignment of the interest of Mary A. Swett, which he can enforce after the death of her surviving parent. It is not alleged by the plaintiffs that the defendant at the time he took the mortgage knew that the property was held in trust. To set aside and cancel the mortgage would deprive the defendant of a right which may be of value to him, and would aid the mortgagors in committing a fraud upon him.

Another and sufficient reason for refusing the prayer of the bill is, that the mortgage contains covenants by the mortgagors that they are the lawful owners of the property, that it is free from all encumbrances, that they have a good right to sell it, and that they will warrant and defend the same against the lawful claims and demands of all persons; and the defendant cannot lawfully be deprived of the right to enforce their covenants against them.

Decree affirmed.

DORA C. BROOKS vs. JOHN A. DUGGAN.

Suffolk. March 29, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Bill of Sale — Receipt — Evidence — Res Gestæ.

Bills of sale of personal property, purchased by one for another and delivered when the price was paid, and receipts for payments thereon, each reciting the name of such other person as the purchaser and signed by the seller, were *held* to be competent evidence, as part of the *res gestæ*, to show for whom the purchase was made and the money paid, there being other evidence of the sale and of the payment of the money.

REPLEVIN of two horses, a wagon, and other personal property. Trial in the Superior Court, before *Hammond, J.*, who allowed a bill of exceptions, which so far as material was as follows.

The plaintiff testified, in substance, that in June, 1884, one of the horses was bought for her by her father, Russell T. French, with money he owed her previous to her marriage; that the other horse was bought by her father in December, 1884, and was given to her by him; and that the wagon was purchased for her in June, 1884, by her father, with her money. On cross-examination, she testified that the wagon was purchased with money which her father owed her previous to her marriage, and was for use in her husband's business. She admitted that she was not present in person at any of the purchases, and did not pay any of the money in person; and that she permitted her husband to use the horses and wagon in his business as he pleased, she paying neither for the care nor for the repairs of the same.

Russell T. French testified that the plaintiff and himself went to one Britton of Stoughton, and one of the horses was purchased by him for her, the money being paid by her; that he could not tell whether a bill was then given; that subsequently on three different occasions he gave money to the plaintiff, and accompanied her to Britton when she paid the same to him; and that he could not give the dates nor the amount paid each time, except that the last amount was about sixty dollars. Two receipts were produced, which he testified were given to the plaintiff on those occasions, for the money paid at the time of the respective receipts. One of these receipts was dated at Stoughton, May 7, 1887, and signed by Britton, and recited that he had "received of Mrs. Dora C. Brooks twenty-five 100 dollars on acct. of bay horse"; and the other, also signed by Britton, was also dated at Stoughton, July 25, 1887, and recited that he had "received of Dora C. Brooks fifty-four 100 dollars, balance due on bay horse." The judge admitted these receipts against the defendant's objection, and the defendant excepted.

French also testified that in the same year he purchased of Britton the other horse, giving his note for it, which he subsequently paid, and that he gave the horse to the plaintiff. A bill of sale, which French testified was given to him for the horse, for the price of which he gave his note, although he did not testify whether it was received by him before or after the payment of the note, was admitted by the judge, and was as

follows: "Stoughton, Mass., Dec. 10th, 1886. Mrs. Dora C. Brooks, To L. G. Britton, Dr. Livery, Sale, and Feed Stable. One bay horse, \$120. Rec'd payment, L. G. Britton." The bill of exceptions did not recite that the defendant objected to the admission in evidence of this bill of sale, or alleged an exception to its admission. French also testified that he purchased the wagon in question, for the plaintiff, of one Clark, and that a bill of sale was given to him by Clark for money paid for the same by him, which bill was as follows: "Brighton, June 30th, 1887. Dorah C. Brook, bought Clark, one two-horse wagon, one hundred dollars. Paid, S. C. Clark." The plaintiff offered this bill in evidence, and the judge admitted it against the defendant's objection, and the defendant excepted.

The plaintiff did not offer either Britton or Clark as a witness to testify as to the receipts or bills of sale, nor account for their absence.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. F. Naphen, for the defendant.

W. B. Orcutt, for the plaintiff.

FIELD, J. It may be conceded that the receipts and the bills of sale were not competent evidence of the payments of money, or of the purchases of the horse and of the wagon, because they were not signed by the defendant, but by persons who are not parties to the suit. *Commonwealth v. Cannon*, 97 Mass. 337. *Lyon v. Manning*, 133 Mass. 439. *McAvoy v. Wright*, 137 Mass. 207.

There was, however, independent evidence that the horse and the wagon described in the bills of sale had been purchased, and that the sums of money described in the receipts had been paid. There was evidence that each of the receipts was given when the money was paid, and apparently the receipted bill of sale of the wagon was delivered when the price was paid. If it be doubtful when the bill of sale of the horse was delivered, it is enough to say that it does not appear that any exception was taken to the admission of this. When receipts and bills of sale are delivered as parts of a transaction, they may be admissible to show the intention of the parties to the transaction, so far as the intention expressed in the papers tends to qualify or char-

acterize the acts done. The papers are a part of the *res gestæ*. We think that the receipts and bills of sale in this case were competent evidence tending to show the person for whom the purchases were made and the money was paid. See *Carmarthen & Cardigan Railway v. Manchester & Milford Railway*, L. R. 8 C. P. 685; *Haynes v. Rutter*, 24 Pick. 242.

Exceptions overruled.

ANNIE E. MAYNARD vs. LUCY A. CLEAVES & another.

Suffolk. March 28, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Devise of Income — Equitable Attachment — "Comfort and Support."

A testator, by his will, gave to his wife during her life the income of all his estate, "to be for her comfort and support," expressing a wish that she provide for an unmarried daughter, and that a "house and grounds" be kept "as a home for them." *Held*, that after the daughter's death the wife had the absolute disposal of the income during her life, and that it might be reached by her creditors.

BILL IN EQUITY, under the Pub. Sts. c. 151, § 1, cl. 11, filed in the Superior Court, to reach and apply, in payment of a debt due to the plaintiff from the first named defendant, her interest in the estate of her husband, Nathaniel Cleaves, held by the other defendant, Henry S. Bean, as the executor of his will. At the hearing, before *Pitman, J.*, the following facts appeared.

The will, which was dated October 4, 1878, and was admitted to probate on October 18, 1880, omitting the parts merely formal, was as follows:

"1. I give and bequeath to my beloved wife, Lucy Ann Cleaves, for and during her life, the use, income, and benefit of all my estate, both personal and real, and wherever the same may be found or located at the time of my decease; to be for her comfort and support, and I trust that she will make suitable provisions for the support of our daughter, Mary Theresa Cleaves, if unmarried. It is my desire that the house and

grounds, No. 567 Dudley Street, in said Boston, now occupied by me, shall be kept as a home for them.

"2. At the decease of my wife, Lucy Ann Cleaves, should she survive me, I devise, give, and bequeath all my estate, both personal and real, share and share alike, to my children, Mary Theresa Cleaves, Ann Elizabeth Bean, wife of Henry S. Bean, Nathaniel Porter Cleaves, Joshua Cleaves, and James Henry Cleaves, and to their legal representatives according to the law of inheritance.

"3. I nominate my son-in-law, Henry S. Bean, to be the executor of this will."

Since the probate of the will, Bean has paid to Lucy A., who is eighty years old, the net income of the estate, without any restriction or limitation as to its use. Mary Theresa Cleaves died before the filing of the bill.

The judge reported the case for the determination of this court, upon the question whether the plaintiff was entitled to have the net income of the estate held by Bean, as executor, applied to the payment of the debt, such decree to be entered as law and justice might require.

Z. S. Arnold, for the plaintiff.

H. E. Ware, for the executor.

MORTON, C. J. By his will Nathaniel Cleaves gives to his "wife, Lucy Ann Cleaves, for and during her life, the use, income, and benefit of all my estate, both personal and real, and wherever the same may be found or located at the time of my decease; to be for her comfort and support, and I trust that she will make suitable provisions for the support of our daughter, Mary Theresa Cleaves, if unmarried. It is my desire that the house and grounds, No. 567 Dudley Street, in said Boston, now occupied by me, shall be kept as a home for them."

The question in this case is, whether the interest of Lucy Ann Cleaves under this will can be reached in equity by her creditors, and applied in payment of the debts due them by her. It is settled in this Commonwealth, that a testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him, or be subject to be taken by his creditors. But in order to give such a qualified estate instead of an absolute one, the language of the testator must be such as

clearly to import an intention to do so. *Broadway National Bank v. Adams*, 133 Mass. 170. *Foster v. Foster*, 133 Mass. 179. *Sears v. Choate*, 146 Mass. 895.

In the case at bar the testator makes an absolute gift of the whole income of his estate to his widow for her life. The words "to be for her comfort and support," at most, express the motive and purpose of the gift, but cannot be held to make the gift conditional. They have little, if any, more significance than the words "to be for her benefit and enjoyment," and are not sufficient to cut down the clearly expressed absolute gift to a qualified or conditional one. She has the right, since the death of the daughter, to use the income in any manner she sees fit, and the executor has no right to withhold any part of it on the ground that she does not need the whole for her comfort and support. She has an absolute estate in the income, which she can alienate, and which can be reached by her creditors.

This case is clearly distinguishable from the case of *Baker v. Brown*, 146 Mass. 369. There the gift was not of the income of a fund, or of any fixed or ascertainable sum of money. The will gave an estate to the daughters of the testatrix, "subject to the condition that they should support their father during his life." It was decided that, under the circumstances of that case, the intention of the testatrix was that the daughters should furnish the father a reasonable support in their own household or elsewhere, the mode of furnishing his support being in their discretion, and that the interest of the father was such that it could not be reached by his creditors without imposing upon the daughters duties and obligations different from and greater than those imposed by the will.

Decree for the plaintiff.

THOMAS SMYTHE vs. CHARLES H. SPRAGUE & another.

Suffolk. March 29, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Insolvent Debtor — Cloud upon Title — Unrecorded Deed — Equitable
Attachment — Estoppel.*

Land conveyed, for a valuable consideration, by an insolvent debtor to a *bona fide* purchaser by a deed not recorded till after his assignment in insolvency, is not "property of the debtor" within the meaning of the Pub. Sta. c. 167, § 46, and will not pass to his assignee.

BILL IN EQUITY, filed in the Superior Court, and a cross bill, to remove a cloud from the title of the plaintiff, and from that of the defendants as the assignees in insolvency of Mayer J. Cohen, respectively, to certain land in Medway. At the hearing, before *Pitman, J.*, the following facts were agreed.

Mayer J. Cohen, on August 11, 1886, owned the land in question, and on that day executed and delivered a deed, purporting to convey it to Hyman Cline and Abraham Cline. On August 12, 1886, this deed was sent by mail to the registry of deeds in Norfolk for record, but no money was sent to pay therefor, and the deed remained in the registry of deeds unrecorded until March 1, 1888, when it was recorded. Abraham Cline and Hyman Cline, on March 2, 1888, for a valuable consideration, executed a deed purporting to convey the land to the plaintiff, which deed was recorded in the registry of deeds in Norfolk on the same day. On November 16, 1886, Cohen duly filed his petition in the Court of Insolvency, and was adjudged an insolvent debtor, and on December 2, 1886, the defendants were duly appointed the assignees in insolvency of his estate, and an assignment duly issued to them, and was recorded in Norfolk on April 28, 1887. Cohen duly filed a schedule of his property in the insolvency proceedings, which did not include or refer to the land in question as his property.

The plaintiff testified that he purchased the land and other property for \$3,750, such other property not being very valuable; that he purchased it in good faith, and that he had no

notice of any defect in the title; that at the time of his purchase it was subject to a mortgage to one Newell, amounting with interest to \$1,416, which mortgage he paid off on March 2, 1888; and that since his purchase he had been, and still was, in occupation of it, either by himself or by his tenant. There was also evidence, that, at a meeting of nearly all the creditors, prior to the assignment, the cash-book and ledger of Cohen were produced, the ledger reciting the following: "April 2d, 1886, sold farm for eleven hundred dollars, three hundred cash, and balance (\$800) to be paid in six months, on delivery of deed"; and the cash-book reciting, under date of August 14, 1886, "From farm, \$500."

The judge found that, prior to the assignment, the creditors and assignees had knowledge that the land had been sold by Cohen, and some money paid therefor; and that they had reason to believe that a deed had been given to the purchaser. The assignees denied that they had actual notice thereof, and the judge was of opinion that, as matter of law, he was not authorized to find that they or the creditors had such notice.

The judge was of opinion that the plaintiff's deed was not valid as against the assignees, and that the defendants only, upon repaying to the plaintiff the amounts paid out by him, were entitled to relief; and reported the case for the determination of this court.

H. E. Fales & S. H. Tyng, for the plaintiff.

C. H. Sprague, for the assignees.

MORTON, C. J. This case raises the question whether land which has been conveyed by an insolvent debtor to a *bona fide* purchaser, for a valuable consideration, by a deed which is not recorded until after the assignment in insolvency, passes to the assignee. We are not aware that this question has been directly adjudicated by this court.

The insolvent law provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him, at the time of the first publication of the notice of issuing the warrant." Pub. Sts. c. 157, § 46.

The general purpose of the law is to vest in the assignee, for

distribution among the creditors, all the property belonging to the debtor except such as is exempt from being taken on execution. It therefore vests all the property of the debtor which he could lawfully have sold, or which might have been taken on execution against him, the last clause being intended, as stated by Chief Justice Shaw, to reach "property which he had fraudulently conveyed, without adequate consideration — such a conveyance of property, which would be good against himself, but which his creditors might attach or take on execution." *Grant v. Lyman*, 4 Met. 470, 473. But it is not within the purpose of the law that the assignee should take property which does not belong to the debtor, even though the title is in him, if he has a bare legal title, and no beneficial interest in it. It has accordingly been held, in several cases, that property held by the debtor in trust for others does not pass to the assignee, although the legal title and the apparent ownership are in the debtor, and although individual creditors, who had no notice of the trust, might take it on execution. *Audenried v. Betteley*, 5 Allen, 382. *Chace v. Chapin*, 130 Mass. 128. *Holmes v. Winchester*, 133 Mass. 140. *Sibley v. Quinsigamond National Bank*, 133 Mass. 515, 528. *Low v. Welch*, 139 Mass. 83.

When we consider the nature of the right of a creditor to take on execution property of the judgment debtor which has been conveyed by an unrecorded deed, we see that it is a right founded upon an estoppel of the grantee in the deed to set up his title. The statute declares that an unrecorded deed "shall not be valid as against any person other than the grantor or lessor and his heirs and devisees, and persons having actual notice of it." Pub. Sts. c. 120, § 4. It does not declare the deed to be void and of no effect; on the contrary, it recognizes it as valid against the grantor, his heirs and devisees, and all other persons who have notice of it. Such a deed conveys the title to the grantee. A creditor of the grantor, without notice of the deed, may take the land on execution; but he has this right, not because it is the property of the grantor, but because the grantee, in violation of our registry laws, has failed to record his deed, has thereby committed a constructive fraud upon the purchaser or creditor, and is therefore estopped to set up his title against him. The right of an attaching creditor is a personal

right of estoppel against the grantee, which enures to his own benefit solely, and not to the benefit of other creditors. The grantee by removing the attachment, or by redeeming from the levy and recording his deed, may, without any further conveyance, perfect his title as to all the world, and prevent any other creditor from asserting a similar right of estoppel against him.

We do not think that such a personal right in a creditor of estoppel against a third person was intended to pass to the assignee, or to enure for his benefit. It is true that land conveyed by an unrecorded deed may be "taken on execution upon a judgment against" the insolvent debtor, but it is not "the property of the debtor." It could not be taken on execution by all the creditors, but only by creditors without notice of the deed. The statute contemplates that all "the property of the debtor," however covered up or concealed, which could be sold by him, or taken on execution by his creditors, should pass to the assignee, but not property belonging to other persons. If the assignee prevails in this case, he takes property which belongs to the plaintiff, and not to the insolvent debtor, and retains also the full consideration which the debtor has received from the plaintiff, of which his estate has the benefit. We do not think that the necessary or reasonable construction of the insolvent law leads to so unjust a result. The defendants rely upon *Bingham v. Jordan*, 1 Allen, 373. It was there held, that when personal property of the debtor had been mortgaged, but the property had not been delivered nor the mortgage recorded, it passed to the assignee.

In the case of an unrecorded mortgage of personal property, the mortgagee takes no title which he can assert against anybody except the mortgagor. Every creditor of the mortgagor, though having notice of the mortgage, can take the property on execution. *Travis v. Bishop*, 18 Met. 804. Whether the doctrine of that case would be held to extend to the case of the sale of personal property for an adequate consideration, and with the payment of the price, though without any delivery, we need not consider. *Dugan v. Nichols*, 125 Mass. 43. There are so many and great differences between a mortgage of personal property and the sale of real estate for an adequate consideration, that we cannot regard that case as a controlling authority

in favor of the assignees in the case before us. We are of opinion, therefore, that the plaintiff Smythe is entitled to the relief he seeks in his bill, and that the cross bill of the assignees should be dismissed.

Decrees accordingly.

COMMONWEALTH vs. ALBERT B. MORGAN.

Middlesex. April 1, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Complaint — "Mixed Liquor" — Variance.

A complaint on the Pub. Sts. c. 100, §§ 1, 27, as amended by the St. of 1888, c. 219, § 1, alleging the unlawful sale of "a quantity of intoxicating liquor, mixed liquor, a part of which is intoxicating," is supported by proof of a sale of whiskey.

At the trial of such a complaint, the evidence of the government was that the article sold was whiskey; but the defendant introduced evidence that it was a mixture containing whiskey and other ingredients, and was to be used as a liniment or wash, and not as an intoxicating drink. The presiding judge refused to rule, as requested by the defendant, that the government was obliged to prove the sale of an intoxicating mixture, that there was a variance between the government's evidence and the complaint, and that there was no evidence to support the complaint. *Held*, that the defendant had no ground of exception.

COMPLAINT alleging that the defendant, on July 23, 1888, at Malden, "did sell to one Margaret McDonald a quantity of intoxicating liquor, mixed liquor, a part of which is intoxicating, he, the said Albert B. Morgan, not being authorized to sell the same."

At the trial in the Superior Court, before *Brigham*, C. J., the government offered evidence tending to show that on July 23, 1888, the defendant sold to Margaret McDonald a bottle containing a liquid of some kind, which smelled and tasted like whiskey.

The defendant offered evidence tending to show that he was an apothecary in Malden, and that the article sold by him to Margaret McDonald on the day in question was a mixture containing the following ingredients, viz. one ounce of alum, one half-ounce of tincture of iodine, eight ounces elixir of calisaya,

and seven and one half ounces of whiskey; and that the mixture was sold as a liniment or wash, and that it could not be used as an intoxicating drink.

At the close of the defendant's evidence, the district attorney admitted that, if the article sold contained the ingredients above named, the mixture could not be used as an intoxicating drink; but offered no evidence in behalf of the Commonwealth to show that the article sold by the defendant was not a mixture, or, if it was a mixture, that the ingredients were in any respect different from those named in the defendant's evidence.

The defendant requested the judge to rule, that under the complaint the government was obliged to prove a sale of an intoxicating mixture; that there was a variance between the evidence of the government and the complaint; and that there was no evidence to support the complaint. The judge declined so to rule, and submitted the case to the jury, upon instructions not excepted to, but which did not include the ruling requested.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. Schofield, for the defendant.

A. J. Waterman, Attorney General, & *H. A. Wyman*, Second Assistant Attorney General, for the Commonwealth.

FIELD, J. The complaint charges the defendant with selling, on July 23, 1888, "a quantity of intoxicating liquor, mixed liquor, a part of which is intoxicating," etc. There was evidence for the jury that the liquor sold was whiskey, and the jury must have so found. This complaint in its phraseology imperfectly follows complaints drawn under statutes which have been repealed. *Commonwealth v. Leonard*, 11 Gray, 458. *Commonwealth v. Burns*, 9 Gray, 287. *Commonwealth v. White*, 10 Met. 14. Rev. Sts. c. 47, § 2. St. 1850, c. 232, § 1. St. 1855, c. 215, § 15. The charge of selling mixed liquors, a part of which is intoxicating, is inappropriate in a complaint under the Pub. Sts. c. 100, §§ 1, 27, and the St. of 1888, c. 219, § 1.

If the complaint could be construed as charging a sale of intoxicating liquor, and of mixed liquor, a part of which is intoxicating, it would be supported by proof of the sale of any intoxicating liquor, because it is necessary to prove only so

much of the charge as constitutes a substantive offence. *Commonwealth v. Leonard*, 11 Gray, 458. It is argued, however, that the complaint cannot be so construed, and that the phrase "mixed liquor, a part of which is intoxicating," must be taken as restrictive of the general words preceding it, and as a specification of the kind of intoxicating liquor alleged to have been sold; and we think that, if the phrase has any meaning, this is the true construction of the complaint. It may be assumed that, if the complaint had charged the defendant with selling intoxicating liquor, to wit, gin, it could not be supported by proof of a sale of whiskey, because the two are different kinds of intoxicating liquor, and a specification intended to restrict the meaning of general words in the description of a criminal act cannot be rejected as surplusage. *Commonwealth v. Luscomb*, 130 Mass. 42.

But it is a matter of common knowledge, that alcohol is the intoxicating element in intoxicating liquor; that pure alcohol is not used as a beverage; and that all intoxicating liquors that are so used contain alcohol mingled with other things, particularly with water. Whiskey is alcohol mingled with water and other elements, of which the alcohol alone is intoxicating. In *Commonwealth v. White, ubi supra*, the indictment was under the Rev. Sts. c. 47, § 2, and charged the defendant with selling "one gill of spirituous liquor," etc. The proof was that the liquor sold was "in the form of gin and brandy, mixed with sugar and water, so as to make what is called toddy or sling." The Rev. Sts. c. 47, § 2, provided that, "if any person shall sell any wine or spirituous liquor, or any mixed liquor, part of which is spirituous, . . . without being duly licensed, . . . he shall forfeit for each offence twenty dollars." The objection taken was that the proof did not show a sale of spirituous liquor, but only a sale of mixed liquor, part of which was spirituous. The objection was overruled, on the ground that, although the article sold might have been properly described as a mixed liquor, part of which was spirituous, it was also well described as spirituous liquor.

The words "mixed liquor, a part of which is intoxicating," do not properly describe any well known kind of intoxicating liquor, but they are not inconsistent with the general words

"intoxicating liquor," and the whole description in the complaint in the case at bar, we think, would be satisfied by any of the well known forms of distilled spirits which are used as a beverage, and which contain alcohol mingled with water and other substances. The instructions given were not excepted to, and are not set out in the exceptions, but it must be taken that they were, in substance, that proof of a sale of whiskey would satisfy the complaint, and that it was not necessary to prove that the liquor sold was an intoxicating mixture in any such sense as would exclude whiskey.

We are not satisfied that the defendant has been aggrieved by the refusal of the court to give the rulings requested.

Exceptions overruled.

MARY V. CARROLL vs. JAMES P. SHEA.

Suffolk. April 3, 1889. — May 11, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Devise — Power to sell — Title in Fee.

A testator, by his will, gave to his wife an estate for life in land, with the power, as his "executrix, in her discretion to sell and convey" it, and to expend the proceeds or a part thereof "for her own comfort and support," and added, that, if she declined or resigned that office, an administrator with the will annexed should have the same power during her life, under the direction of the Probate Court. *Held*, that the wife in her own right, and as executrix, could convey a good title to the land in fee, by separate deeds in each capacity, or by one deed in her twofold capacity.

CONTRACT for breach of an agreement in writing, signed by the plaintiff and the defendant, as follows: "Boston, Mass., Nov. 10, 1888. James P. Shea agrees to purchase of Mary V. Carroll for the sum of twenty-four hundred dollars the estate on Bunker Hill and Ferrin Streets, Boston, Mass., bounded northeasterly by Bunker Hill Street 19 ft., southeasterly by a five-foot passageway 55.8 ft., southwesterly by Ferrin Street 29.2 ft., and northwesterly by a line 40 ft. southeasterly of Bates Street 60 ft. Said Carroll agrees to sell and convey to said Shea the

said premises for said sum by a warranty deed conveying a good title. Deed to be delivered and cash paid at No. 209 Washington Street, Boston, Room 53, Nov. 16th, 1888, at 10 A. M."

The answer admitted "that the agreement alleged was made and signed as alleged; that a deed in the usual form of a warranty deed, executed by the plaintiff as executrix of the will of Edward Carroll and also in her own right, and sufficient in form to convey a good title, was tendered to the defendant"; and alleged that the plaintiff "fulfilled her part of said agreement so far as she had power to do so; but the defendant denies that the plaintiff, either as executrix or in her individual right, took under said will a title in fee simple to said premises, or a right or the power to convey the same to the defendant; and says that said deed so tendered was inoperative to convey to the defendant a good title to said premises."

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, in substance as follows.

The will of Edward Carroll, senior, contained the following provisions:

"I give, devise, and bequeath unto my wife, Mary V. Carroll, the use, income, and improvement of all the estate, both real and personal, which I shall leave at my decease, during the remainder of her natural life.

"I hereby appoint the said Mary V. Carroll the executrix of this will, and I authorize and empower her, as such executrix, in her discretion to sell and convey, at public or private sale, by an absolute title, the whole or any portion of my said real and personal estate, and the proceeds thereof to invest in other real or personal estate, or she may, from time to time, expend such portion or all of said proceeds, if necessary, as she in her discretion may deem proper, for her own comfort and support, or for the education and support of my son, Edward Carroll, Jr., or for both of them.

"In case my wife shall decline or resign the said office, then I give the same power to any administrator with this will annexed, except that such power shall not be exercised unless by the license and direction of the Probate Court, and such power shall not continue beyond the life of my wife.

"All the rest, residue, and remainder of all my said real and personal estate, and the proceeds thereof, and all property both real and personal acquired by the proceeds thereof, I give, devise, and bequeath unto my only son and child, Edward Carroll, Jr., his heirs and assigns, to his and their own use ; provided, however, that in case my said son Edward shall die before arriving at the age of twenty-one years and without leaving any issue living, then so much of said rest, residue, and remainder as shall not have been expended for the support, education, care, and burial of my said son I give, devise, and bequeath unto the Association for the Protection of Destitute Catholic Children, in said Boston, now established on Harrison Avenue, its successors and assigns, absolutely, for the uses of said association ; but the whole thereof may be expended for my said son before his majority if necessary."

Edward Carroll, Jr. died before the death of the testator, without issue, and under twenty-one years of age. The personal estate given to the plaintiff by the will was insufficient for her comfort and support, and, in the exercise of a wise discretion, it was reasonable for her as executrix to sell and convey the real estate in question in fee, if she had the power so to do, and to expend portions of the proceeds thereof for her own comfort and support. By the will, the plaintiff took an estate for her life in the real estate described in the declaration, and had good right to convey the same to the defendant.

If, by the power given to the plaintiff as executrix, she acquired by the will the authority to convey the estate in fee subject to her life estate, judgment was to be entered for the plaintiff in the sum of \$200 damages, with costs ; otherwise, for the defendant.

C. Robinson, Jr. & G. A. Blaney, for the plaintiff.

H. W. Bragg, for the defendant.

FIELD, J. The plaintiff in writing agreed to sell, and the defendant to buy, certain real property situated on Bunker Hill Street and Ferrin Street in Boston, of which Edward Carroll died seised. By the agreement, the plaintiff is to give "a warranty deed conveying a good title." The question is whether the plaintiff, either in her own right, or as executrix of the will of Edward Carroll, or in both capacities, can convey a good title.

It is clear that the will gives her an estate for her life in this real property, and, as executrix, a power to sell and convey the fee. The case differs from such cases as *Hale v. Marsh*, 100 Mass. 468, *Dodge v. Moore*, 100 Mass. 385, and *Cummings v. Shaw*, 108 Mass. 159, mainly in this, that the plaintiff holds her life estate and the power in different capacities. If it is necessary that she execute two deeds, one in her own right of the life estate, and the other as executrix of the remainder in fee, or execute one deed of the whole estate, but in two capacities, the answer shows that the deed or deeds she has tendered are admitted by the defendant to be sufficient to convey a good title, if she can in any manner convey a good title in fee simple. It may be that the power was given to the plaintiff as executrix in order to avoid the question which was decided in *Welsh v. Woodbury*, 144 Mass. 542; but the fact that the power was given to her as executrix, and, in case she declined or resigned that office, then to an administrator with the will annexed, with the limitation that it should not be exercised by the administrator "unless by the license and direction of the Probate Court," and should not continue beyond the life of the wife, does not impair the power she has over the fee while she is executrix. We think she can convey a good title in fee simple. The power given is ample, and it is to be exercised "in her discretion," and it is plain that the purchaser is not required to see to the application of the purchase money, because she is authorized to "expend such portion or all of said proceeds, if necessary, as she in her discretion may deem proper, for her own comfort and support," etc.

Judgment affirmed.

CHARLES ALEXANDER & others vs. MAXIMILIAN KAISER.

Suffolk. March 7, 1889. — May 14, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Witness — Immaterial Cross-examination — Non-contradiction.

If a question is put to a witness on cross-examination, which is collateral or immaterial to the issue, his answer cannot be contradicted.

CONTRACT for goods sold and delivered. After the former decision, reported 144 Mass. 71, the case was again tried in the Superior Court, before *Mason, J.*, who, after a verdict for the plaintiffs, allowed a bill of exceptions, which, so far as material, appears in the opinion.

S. A. B. Abbott, for the defendant.

E. Avery & G. M. Hobbs, for the plaintiffs.

MORTON, C. J. Under the former decision in this case, the Superior Court rightly admitted the books of the plaintiffs, supported by the suppletory oath of the person who made the entries, as evidence of the sale and delivery of the goods sued for. *Kaiser v. Alexander*, 144 Mass. 71. The defendant contends that the books were allowed to be used for an unlawful purpose; but upon this point the bill of exceptions is not clear, and we need not consider it, as there is another ground upon which a new trial must be granted.

Upon the cross-examination of the defendant, he was shown a note signed by Frost and Company, payable to and purporting to be indorsed by him, and he was asked if he did not give that note to the plaintiffs in part payment of a bill of goods sold by them to him. He answered, that he did not, that he had never seen the note, and that the indorsement was a forgery. On rebuttal, one of the plaintiffs and their bookkeeper were allowed to testify, for the purpose of contradicting the defendant, "that the Frost & Co. note was brought to them by the defendant, and offered, and received by them in part payment of a bill of goods, not being any of the goods described in the declaration, then due from the defendant, that the defendant indorsed the note in

their presence, and had after it was due said he would pay it." This evidence was clearly prejudicial to the defendant, and therefore its admission, if erroneous, furnishes a ground for a new trial. It is to be observed that the Frost and Company note, though originally sued on, was withdrawn by the plaintiffs, and no recovery was sought thereon.

The evidence related to an independent and distinct transaction, which was not involved in any issue in this case, but was collateral and immaterial. If a party cross-examines a witness upon a collateral matter, he must take the answer as it is given; he cannot contradict it, and thus raise an immaterial and foreign issue, of which the other party has no notice, and which he may not be prepared to meet. *Eames v. Whittaker*, 128 Mass. 342. *Shurtleff v. Parker*, 130 Mass. 293. This rule of law was disregarded by the admission of the evidence above stated, and therefore the defendant is entitled to a new trial.

Exceptions sustained.

PEOPLE'S ICE COMPANY vs. CHARLES E. DAVENPORT.

Norfolk. March 25, 1889. — May 14, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Great Pond — Ice — Title — Conversion.

The owner of an icehouse upon the shore of a great pond, who scrapes the snow from about half the ice therein, marking it off with stakes, and then suspends operations upon it, acquires no title to the ice scraped such as will enable him to maintain an action against the owner of another icehouse on the pond, who five days later begins to cut and gather such ice, for its conversion.

TORT for the conversion of and damage to certain ice. Trial in the Superior Court, before *Aldrich, J.*, who reported the case for the determination of this court, in substance as follows.

The plaintiff and the defendant were proprietors of icehouses on Sprague Pond, a great pond in Dedham and Hyde Park, and had an equal and common right, or right in common, to take ice from any and all parts of the pond.

Otis H. Weed, called by the plaintiff, testified as follows: "I am the president of the People's Ice Company. Icehouses of that company are at the north end of Sprague Pond, and the defendant owns icehouses at the south end of that pond; all the icehouses are near the railroad. Our houses are in Hyde Park, and Mr. Davenport's are in Dedham. I was at the pond at the time the Davenports were scraping the first snow off from the ice. They had then scraped full half-way of the pond. This was in January, 1888. Afterwards, in the same month, we scraped the snow off of the pond at the northerly end thereof, up to the line where they had scraped previously. This line ran right across the pond from the railroad, at a right angle with the railroad. After a few days, I was at the pond in the morning, and found their teams at work marking and grooving about an acre of ice that we had previously scraped. This was at the westerly side of the pond. They cut eight hundred tons of this ice, and from the manner in which they cut it, affected other ice which we had scraped, so that we were prevented from cutting two hundred tons more. Mr. Davenport told me, at the time they first scraped the ice that winter, that he should not want any ice beyond the line of that scraping. I was at the pond the morning of the day they commenced to cut the ice on our side of the line, and told them that they were trespassing on our property. The only thing that we did to this ice was to remove the snow from its surface, and to put down stakes so as to show where the line of scraping was. I had been at the pond nearly every day between the time we scraped the ice and the time they cut it. The day previous to the day they cut it, I went across the pond on the side near the railroad, but not on the side where this ice was cut by defendant. It was five days between the time we cleared the ice and the time when Mr. Davenport cut it."

There was no other evidence that the plaintiff had taken or retained possession of the ice in question.

Upon this evidence, the judge ruled that the plaintiff could not maintain the action, and directed a verdict for the defendant, and reported the case for the determination of this court. If the ruling was right, judgment was to be entered upon the verdict; otherwise, the case was to stand for trial.

A. B. Wentworth, for the plaintiff, cited *Gould on Waters*, § 191; *Woodman v. Pitman*, 79 Maine, 456; *People's Ice Co. v. The Excelsior*, 44 Mich. 229; *Hickey v. Hazard*, 3 Mo. App. 480; *Wood v. Fowler*, 26 Kan. 682.

J. E. Cotter & C. F. Jenney, (*E. Davis* with them,) for the defendant.

MORTON, C. J. The plaintiff never was in the possession of the ice for the value of which this suit is brought, after it was cut and severed from the real estate. It scraped off the snow from an area which covered about half of the pond, and put down stakes to show where the line of scraping was. It then suspended operations for at least five days before the defendant began to cut ice. The question is whether this gave the plaintiff any title to the ice which it had thus scraped. We think it did not. It is too well settled to be disputed that the property in the great ponds is in the Commonwealth; that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes; and that the owners of the shores have no exclusive rights in them except by a grant of the Legislature. *Hittinger v. Eames*, 121 Mass. 539. *Gage v. Steinkrauss*, 131 Mass. 222.

The right to cut ice is common to all the public. The plaintiff has this right in common with the rest of the public, but it cannot by its own act appropriate a part of the pond by scraping it, or setting up stakes, and exclude the public from it. The ice until it is cut remains a part of the realty, and no one has any exclusive title in it. There is no statute or other law which enables an owner of the shore, or any other person, thus to exclude the public.

In *Hittinger v. Eames*, *ubi supra*, it appeared that the owners of the shore of Fresh Pond had, by an indenture, undertaken to divide the pond among themselves, and were accustomed at the beginning of the winter to scrape and mark off by stakes their respective shares of the pond; but the court held that they could not thus exclude the public from taking ice.

The case of *Rowell v. Doyle*, 131 Mass. 474, is similar to the case at bar. There the plaintiffs had cleared off the snow, and were proceeding to make ready for harvesting the ice. The defendant cut several holes through the cleared ice for the pur-

pose of fishing, and the plaintiffs sued him in an action of tort. The court held that the action could not be maintained, saying in the opinion, that the plaintiffs "had the same right as others to cut and take ice which was the natural product of the pond; but they had no right, to the exclusion of other public uses, to the occupation of any part of the pond for the purpose by artificial means of increasing the thickness of the ice. At the time of the acts of which they complain, they had not cut any ice, nor were they engaged in cutting, or otherwise in the actual possession of any; but they had suspended their operations for at least a day and two nights." If the plaintiffs had acquired any title to the ice which they had scraped, the decision must have been otherwise.

Upon the facts of the case at bar, we are of opinion that the plaintiffs had no title to or possession of the ice cut by the defendant which enables them to maintain an action of tort in the nature of trover.

The case is not like one of capturing animals *feræ naturæ*, or of taking possession of derelict property. It is more analogous to the case of a tenant in common attempting to take possession of a part of the common estate, by staking it off and thus excluding his cotenants. *Judgment on the verdict.*



THOMAS CASSIDY vs. CHARLESTOWN FIVE CENTS SAVINGS
BANK.

Suffolk. March 26, 1889. — May 14, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Deed — Title — Extrinsic Evidence.

A deed of land contained in its granting part a clear and exact description, by metes and bounds, of a lot adjoining that of the grantors, followed by the clause, "being the same premises formerly conveyed by grantors to O. W. M. by deed dated September 1, 1868, and recorded with S. Deeds, book 987, page 183," which deed correctly described the land intended to be conveyed. *Held*, that the grantee did not acquire a good title to the grantors' land.

BILL IN EQUITY, filed July 9, 1888, to recover a portion of purchase money paid in cash for land, and to enjoin the negotiation or collection of a mortgage note given for the balance. The case was heard by *Devens, J.*, who reported it for the consideration of the full court, in substance as follows.

Joseph H. Locke and one Colesworthy were seised in fee simple of adjoining lots of land, of equal size, running from Cherry Street to Chestnut Street in Chelsea, and numbered respectively 24 and 26 on a plan of the lands of the Winnisimmet Company. Locke applied to the defendant bank for a loan to be secured by a mortgage of his land, and upon the recommendation of its investment committee, which examined the land, the defendant made the loan to Locke, who thereupon executed the mortgage. The mortgage deed, which was dated March 15, 1875, recited that Locke and his wife, in consideration of the loan by the defendant corporation, "the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said corporation, its successors and assigns, a certain parcel of land, with the buildings thereon, situate in Chelsea in said county, and bounded and described as follows, viz." Here followed an accurate description by metes and bounds of lot No. 26, owned by Colesworthy. "Containing three thousand six hundred square feet, being the same premises formerly conveyed by grantors to Otis W. Merriam by deed dated September 1, 1868, and recorded with Suffolk Deeds, book 937, page 183." The deed referred to correctly described the land which Locke intended to convey to the bank.

On February 5, 1881, the bank made an entry upon the land owned by Locke, to foreclose the mortgage for breach of the condition thereof, and on April 3, 1883, sold the land under a power of sale in the mortgage to a third person, who reconveyed it to the bank on April 17, 1883, both deeds containing the same erroneous description found in the mortgage deed from Locke to the bank. Subsequently, on June 5, 1888, the defendant, in ignorance of the false description in the deeds, executed a quitclaim deed to the plaintiff, which was intended to be a conveyance to him of that half of the Locke estate bounding on Chestnut Street, but which in fact described the corresponding half of the Colesworthy lot, the plaintiff paying therefor two

hundred and fifty dollars in cash, and giving a promissory note for twenty-two hundred and fifty dollars, secured by a mortgage back of the land.

If upon these facts the defendant did not acquire title to the Locke estate, it was agreed that the bank was to pay over to the plaintiff two hundred and fifty dollars, and be perpetually enjoined against negotiating the note given for the balance of the purchase money; otherwise, the bill was to be dismissed.

W. H. Hart, for the plaintiff.

S. T. Harris, for the defendant.

MORTON, C. J. The only question presented to us is whether the deed of mortgage from Locke to the defendant bank conveyed a good title of the Locke estate to the bank. At the date of the deed, Locke owned a lot of land on Chestnut Street in Chelsea. One Colesworthy owned the adjoining lot. The description in the granting part of the deed of Locke is an exact description, by metes and bounds, of the Colesworthy lot; it cannot apply to any other lot. At the end of the description is the following clause: "Being the same premises formerly conveyed by grantors to Otis W. Merriam by deed dated September 1, 1868, and recorded with Suffolk Deeds, book 937, page 183." The deed to Merriam referred to correctly describes the Locke estate. If we could resort to external evidence, it might appear that Locke's intention was to convey the lot owned by him. But we must look for the intent in the deed itself, and if the terms of the deed do not express the intent, it must fail. The description in the granting part of the deed is explicit and unambiguous, and imports an intention to convey the Colesworthy lot. The words descriptive of the estate intended to be conveyed are wholly without ambiguity. The subsequent clause, referring to the deed to Merriam, does not create any ambiguity in the prior description, but is repugnant to it. This clause was not inserted for the purpose of describing the lot conveyed.

Where, as in this case, the deed conveys one estate by a particular description, such description must prevail over a subsequent general reference to a prior deed made for another purpose, and such reference must be rejected. See *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15.

The defendant is not without a remedy. It could by a suit in

equity compel Locke to reform the deed, so as to give it a title to the lot which was in fact intended to be conveyed; but upon the deed as it stands, we are of opinion that it has not a good title in law which it can convey to the plaintiff. The plaintiff is therefore entitled to a decree according to the terms of the report.

Decree for the plaintiff.

RACHEL MURRAY vs. COUNTY OF NORFOLK.

Norfolk. March 18, 1889. — May 17, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Relocation of Way — Notice — Assessment of Damages — Statute.

Upon a petition to the Superior Court for a jury to assess damages caused by the relocation of a way, it is not open to the petitioner to object that proper notice was not given him of such relocation, an action of tort or certiorari being the remedy, if any, for a defective notice.

The owner of a strip of land taken for the relocation of a way was permitted, by the county commissioners' order, to remove property upon it within a limited time, after which the town ordered to do the work cut down a hedge upon it as well as trees in front of it within the original limits of the way, and, without any notice to him or other proceedings had, removed a fence and wall forming a single structure remaining upon the strip. *Held*, upon such a petition, that the owner could not recover the value of the hedge or trees, but was entitled to that of the fence and wall.

PETITION to the Superior Court, under the Pub. Sta. c. 49, §§ 13, 105, for a jury to assess damages caused by the relocation and widening of River Street in Hyde Park.

At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict assessing the petitioner's damages, and both the petitioner, who was dissatisfied therewith, and the respondent, alleged exceptions, the substance of which appears in the opinion.

W. H. Towne, for the petitioner.

T. E. Grover, for the respondent.

DEVENS, J. The case at bar is before us on exceptions to the rulings of the presiding judge by both the petitioner and the respondent in a proceeding to assess the damages sustained by the petitioner by the relocation and widening of River Street,

a highway in the town of Hyde Park. The county commissioners made a decree for this relocation, which took from the petitioner a strip of land about eleven feet in width, extending along the front of her estate on that street. This decree was recorded on July 26, 1887, and ordered the town of Hyde Park to construct the street as located anew within one year from that date, according to a plan which was made part of the decree, to the satisfaction of the commissioners, and provided that the damages occasioned by the relocation and construction should be paid by the county.

The decree and order were filed with the town clerk, and the petitioner had no actual notice thereof; but we do not understand that this has been insisted upon by the petitioner in argument. Nor can we perceive that such an objection could properly be availed of here. Not only has the petitioner had all the notice which the statute requires, (Pub. Sts. c. 49, § 9,) but by bringing her petition to the Superior Court for the assessment of her damages she necessarily assumes that the proceedings were legal and regular, and that she is entitled to avail herself of this statutory process, which is a substitute for the petition for a sheriff's jury. Pub. Sts. c. 49, § 105. If she sought to avail herself of a defective notice, her remedy would be by an action of tort, or by a petition for a certiorari to quash the proceedings. *Foley v. Haverhill*, 144 Mass. 352.

By the decree the owners of the land taken were given three months within which to remove property consisting of "timber, wood, and trees, and to remove their buildings, structures, hedges, walls, and fences," on the land taken for the widening. Upon the strip taken from the petitioner there was a hedge which was not removed by her, but was cut down by the town in the work of widening, which was not commenced until nearly a year after the decree. There were also in front of the petitioner's premises, but within the limits of the highway as it existed before the widening, seven trees, which were cut down by order of the selectmen of Hyde Park in reconstructing the street. For this hedge and the trees the petitioner claimed she was entitled to recover damages, but the court ruled otherwise, and held that, if not removed, they must be taken to be forfeited to the town, to which ruling the petitioner excepted.

We must assume that the instructions of the court were correct, except in the particulars to which the petitioner excepted, and that, as the assessment of damages related back to the time of taking, the jury were allowed to consider the value of the land taken, the injury, if any, to her remaining land, whether occasioned by the removal of the hedge and trees or otherwise, the cost of fencing, and generally damage done to the petitioner, whether by taking her property or in any other manner, and that she was merely prevented from recovering the specific value of the hedge and trees. In connection with such instructions, the jury would necessarily understand that the petitioner would be entitled to the full value of the land taken, with all that was upon it, with all injury to the remaining land, deducting therefrom the value of the hedge and trees for the purpose of removal, the claim for which the ruling treats as abandoned by the owner's neglect to remove the same within the time allowed. It remains to be considered whether the court could rightfully hold that such a deduction could be made.

This depends primarily upon the interpretation of the Pub. Sts. c. 49, § 9. The last clauses of this section are as follows: "They [the commissioners] shall also allow the owner of the land a reasonable time, which shall be expressed in their return, to take off his timber, wood, or trees. If he fails to remove the same within the time allowed, he shall be deemed to have relinquished his right thereto for the benefit of the town." The Pub. Sts. c. 49, § 51, which authorize a jury assessing damages to extend the time for such removal, provide: "If he [the owner of the land] neglects to take off the same within the extended time, he shall be deemed to have relinquished his claim thereto for the benefit of the town, as before provided." It is the contention of the respondent, that the statute intends that in case of failure to remove trees there shall be no compensation therefor. All that is taken for the highway is an easement in the land, and the trees, etc. which are upon the land are not intended to be taken, and ample opportunity is given to remove them. When it is provided that, if not removed, it shall be deemed that the "right thereto" — or the "claim thereto," as § 51 has it — is relinquished for the benefit of the town, it must mean that such right or claim is abandoned. It is not easy to

see how the relinquishment could be of benefit to the town constructing the road, if the value of the trees which the owner thus relinquishes is to be paid for. Nor do we perceive that there is any constitutional objection to this construction. We readily concede the petitioner's proposition that the duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. But when that which is upon the land in the shape of trees, etc. is not sought to be taken by the location, when time is given for its removal, and when if not removed no deduction is made from the owner's damages except of its value for the purpose of removal, we do not perceive that any injustice is done him, or that he may not properly be deemed to have abandoned any claim for compensation for such property if he thus relinquishes it. *Commonwealth v. Noxon*, 121 Mass. 42. *Colburn v. Kittridge*, 131 Mass. 470, 472.

There is a separate ground, so far as the trees, as distinguished from the hedge, are concerned, upon which the court also ruled that the petitioner could not recover their value. These trees were within the limits of the old way. They were not cut down by any order of the commissioners. The removal of obstructions in the street or highway is a duty which is left with the town. If these trees became an obstruction in the street by reason of its widening, in the opinion of the proper officers of the town, it was for them so to determine, and to order their removal, and their decision is conclusive. *Morrison v. Howe*, 120 Mass. 565. Whether the officers of Hyde Park took the necessary steps to give themselves authority to cut down these trees, if any such were required, or whether they were cut down without such authority, the act done was theirs, and not that of the county, and in neither event is it responsible. Pub. Sts. c. 52, §§ 8-10. St. 1885, c. 123, § 2. The trees were not within the limits of the new location, and not upon the land at that time as a part of the petitioner's property. They were cut down by the order of the selectmen, and not by that of the county commissioners. We are of opinion, for the reasons above stated, that the petitioner was not entitled to recover either the value of the hedge or that of the trees.

The respondent excepted to the ruling of the court by which

the petitioner was entitled to recover for the value of a fence and wall, constituting but a single structure, which stood upon the strip taken from the petitioner under the order of the commissioners, the wall being used by the town in the construction of the sidewalk of the way as relocated. Section 17 of chapter 49 of the Public Statutes, under the provisions of which this ruling was made, provides that, "If the owner of any building or materials, on land a part or the whole of which is taken, refuses or neglects to take care of or to remove such buildings or materials, after reasonable notice in writing from the commissioners, they may take such care of the same as the preservation thereof or public safety demands; or may remove the same upon the adjoining land of such owner, or elsewhere; or may sell the same at public auction, after five days' notice of such sale, and hold the proceeds for the benefit of such owner; and the expense so incurred, or the value thereof to the owner, shall be allowed in reduction of his damages."

The order of the county commissioners allowing landowners three months within which to remove their trees, etc., had included also any buildings, structures, walls, fences, etc., on the land taken; but no notice in writing was given to the petitioner to remove the wall and fence, nor were any proceedings taken for the removal thereof, or for the sale of the materials, such as this section contemplates. It was therefore held by the presiding judge, that, as neither the town nor the commissioners resorted to the statutory powers with which they were invested, the petitioner might recover compensation therefor, the jury being cautioned not to include the value of the fence and wall in their estimate of the value of the land taken, and then assess the value of the fence and wall separately, and thus give the petitioner the value of the same twice. If this ruling is correct, a quite different rule is applicable to the "timber, wood, or trees," which are the only things expressly named in § 9, and to the buildings or materials which are upon the land, and it would not be necessary that the return of the commissioners transmitted to the town should specify any time for the removal of buildings or materials, as these must necessarily be disposed of under the provisions of § 17.

The respondent contends that § 17 furnishes only a cumulative

remedy to that provided by § 9; that under § 9 it is necessary that the commissioners should give a reasonable time for the removal of the wall and fence; that the property would be forfeited if not removed within such time; and that § 17 only provides that additional proceedings may be had in the disposition of such property. If, in addition to "timber, wood, or trees," § 9 had included "buildings or materials," such a construction might be possible, although even then the existence in § 17 of the careful provisions for preserving the buildings and materials, or the value thereof, to the owner, would afford strong ground for maintaining that these were intended to be excepted from the provisions by which such property is deemed to be relinquished for the benefit of the town. But the result which is reached under § 9, where the property is deemed to be relinquished for the benefit of the town, and under § 17, where the value of the property is carefully preserved to the landowner, are so inconsistent that they cannot coexist if applicable to the same property. It must be held, therefore, that the property specified under § 17 is not included in § 9, it not being there included in terms, and that it has been determined to prescribe one rule for the timber, wood, or trees, and perhaps for crops grown upon the land, and another and different one for the artificial structures erected upon it, and their materials.

The respondent relies much on a statement made *obiter* in *Commonwealth v. Noxon*, *ubi supra*, where it is said, "There can be no doubt that the statute above quoted, (Gen. Sts. c. 43, § 13, Pub. Sts. c. 49, § 9,) although it names only 'timber, wood, or trees,' must apply also to buildings and parts of buildings, materials of walls and fences, growing crops, and generally everything valuable to the owner, but inconvenient or unsuitable to be left within the limits of the way." The Pub. Sts. c. 49, § 17, are substantially the same as the St. of 1871, c. 382, § 4, and constitute a re-enactment of that section. The St. of 1871, c. 382, is what is known as a betterment act, which did not take effect, with the exception of § 4, unless the act was accepted by the town, or unless a previous act, that of the St. of 1869, c. 169, had already been accepted. The exception of § 4 from the provision requiring acceptance of the act of 1871 gave it force throughout the Commonwealth. The Pub. Sts. c. 51,

are a re-enactment of the St. of 1871, c. 382, with the exception of § 4, which is there omitted, and properly transferred to the Pub. Sts. c. 49, the highway act.

While the Pub. Sts. c. 49, § 17, were therefore, as § 4 of the St. of 1871, c. 382, actually then operative, it evidently did not attract the attention of the learned judge who gave the opinion in *Commonwealth v. Noxon*, nor did he observe that any other provision than that now found in the Pub. Sts. c. 49, § 9, had been made for damages done to buildings and materials when a highway was laid out over land on which they were. Nor is it surprising that this should be so; he was dealing with an order passed in 1852, long before the St. of 1871, c. 382, § 4, was passed, and with the inquiry whether a person who had simply permitted a building allowed by commissioners to remain on land taken for a highway "during its natural life," who had received no notice to remove it, and when no entry for the purpose of possession had been made on the land, could be indictable for maintaining a nuisance.

The statement made in *Commonwealth v. Noxon* is also cited incidentally with approval in *Colburn v. Kittridge*, 131 Mass. 470, 472, in considering whether commissioners in laying out a highway had authority to allow a building to remain within its limits. In this case also, the court was dealing with an order passed long before the passage of the St. of 1871, c. 382, § 4, the effect of which it was not necessary then to consider. But if it was possible to give the words "timber, wood, or trees" so wide a signification as to include buildings, fences, and other artificial structures, or the materials thereof, when no other provision had been made for the removal of that which was upon the land when it was taken for the public use of a highway, yet since a provision has been made for the disposition of such structures, the preservation or the sale thereof, and the payment therefor, such provision must be the one which in regard to them is controlling.

We are therefore of opinion, that the court rightly ruled that for the wall and fence the petitioner was entitled to recover. The result is, that as to the exceptions of both the petitioner and the respondent, the entry must be

Exceptions overruled.

SARAH A. WOODMAN vs. METROPOLITAN RAILROAD
COMPANY.

Suffolk. March 21, 1889. — May 31, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Negligence — Street Railway — Independent Contractor — Due Care —
Nuisance.*

A street railway corporation employed to lay a new track in a city street a contractor who so negligently enclosed the space where the track was being laid that the ends of rails lying there projected beyond the barrier into the street at a point where there was no crosswalk. A person crossing the street at this point after dark fell over the ends of the rails and was injured. *Held*, that the corporation was liable for the injury, and that the fact that the work was being done under an independent contract would not exonerate it from liability.

TORT by the administratrix with the will annexed of Sir Moses D. Perkins, for personal injuries sustained by him, through the alleged negligence of the defendant while crossing Adams Square in Boston. Trial in the Superior Court, before *Sherman, J.*, who allowed a bill of exceptions, which so far as material was as follows.

There was evidence tending to show the following facts. Perkins was injured on October 15, 1885, at about half-past six o'clock in the afternoon, at which time it was dark, the sun on that day having set at two minutes past five o'clock. On that date the defendant was having an additional car track laid through the lower part of Adams Square, which is a public highway in the city of Boston, from Devonshire Street northerly into New Washington Street. The defendant had duly obtained a location from the proper municipal authorities, and a permit to dig up the street, and Gore and Company, contractors, were doing the work. A trench had been excavated through Adams Square, except at a point where an existing track called the South Boston track extended from Devonshire Street northerly and westerly into Brattle Street, passing in a curve around the east and north side of the Adams Monument, so called, placed near the centre of the square. This track, with a clear space of several feet on either side, was left unobstructed, for passage

between the easterly and westerly portions of the square. At each side of the passage and across the ends of the trench were placed wooden horses as barriers. Between that portion of the trench on the southerly side of this passage and the monument was a pile of dirt thrown up in digging, and then a pile of rails, ten or fifteen in number, thirty feet long and ten or fifteen inches high, lying parallel with the excavation. At the close of work on October 15, a barrier consisting of one or two heavy sticks of timber, and intended to protect passers by from injury by reason of the excavation or of the piles of dirt and rails, had been placed so as to extend from the pile of dirt to the curb of the monument, the middle portion running across and above the pile of rails, and supported upon it by a block of wood placed on the rails. The ends of the rails projected irregularly beyond this barrier and towards the passage, as was variously estimated, from five or eight inches to four or five feet.

The shortest route for a person going from the lower or east side of Adams Square over towards Brattle Street was through the passage above described, between the two portions of the trench. There was no cross-walk maintained through this passage. The plaintiff's testator, who was between eighty-three and eighty-four years old, was seen just before the accident walking at a moderate pace across Adams Square through this passage towards Brattle Street, and at a point about half-way between the monument and the South Boston track was seen to fall. When he was reached by those who came to his assistance, he was lying on the ground within two feet of the end of the pile of rails, and on the side towards Brattle Street, and was found to have been injured. Assistance was rendered him, and he was taken to his home. The next morning spots of blood were found on the pavement, from twelve to eighteen inches from the projecting ends of the rails.

On the question whether the place where the accident occurred was properly lighted, the evidence was conflicting. One witness only testified that there was no lantern on the pile of rails, and that an electric light near by in the square was not burning; while many other witnesses testified that the electric light was burning, and that lighted lanterns were placed on the timbers lying across the pile of rails and all along the trench.

Upon the issue as to the defendant's liability for the acts of those employed to do the work, evidence was admitted tending to show that the work was done under a verbal agreement between Gore and Company, the contractors, and the president of the defendant corporation; that the defendant was to furnish the materials, and the contractors were to procure the permit, supply the labor, and do all the work except the teaming, and were to attend to the lighting and fencing of the place where the work was to be done; that the barriers were placed and the lights set by persons employed by the contractors; and that the rails were left where they were by order of the contractors' foreman.

The judge refused to give the following instructions, as requested by the defendant:

"1. Plaintiff cannot recover on the whole evidence.

"2. The plaintiff has not sustained the burden of proof on the question of Mr. Perkins's exercise of due care, and therefore cannot recover.

"3. There is no evidence to go to the jury that Mr. Perkins when he fell was in the exercise of due care.

"4. There is an utter absence of any evidence of what Mr. Perkins's conduct was just before he fell and when he fell, and so there is no sufficient evidence to justify the jury in finding that he was in the exercise of due care.

"5. If it is impossible for the jury to say what Mr. Perkins was doing, and what his conduct was just before he fell and at the moment he fell, the plaintiff has not sustained the burden of proof, and the verdict of the jury must be for the defendant. . . .

"8. Mr. Perkins, being a foot passenger, was bound to keep on the sidewalks and street crossings in passing from the lower to the upper side of Adams Square, and by unnecessarily diverging therefrom he took the consequences, and his administratrix cannot recover.

"9. The Metropolitan Railroad Company, having employed Gore & Co. to construct the new track, is not liable for any injury suffered by plaintiff's testator caused by negligence of Gore & Co.'s servants, if there was such negligence.

"10. If the jury are satisfied that under this contract between the defendant and Gore & Co. it was the duty of the

latter to place proper barriers and lights, then the defendant cannot be held liable for any negligence of Gore & Co. in failing to place the barriers and lights properly, if the jury should find they were improperly placed.

"11. There is no sufficient evidence of negligence or carelessness on the part of Gore & Co. or its servants in placing the barriers and lights to warrant the jury in finding a verdict against the defendant."

The judge, after instructing the jury that the plaintiff must prove that the testator was in the exercise of such care as a person of his age would ordinarily exercise under the circumstances, said, among other things: "Something has been said about where Mr. Perkins had a right to walk, and where he had not a right to walk. I do not understand that there is any rule of law in regard to that. A man has a right to walk anywhere in the street or sidewalk, provided he exercises due care. If it is not due care to leave a sidewalk or flagging, then he is not in the exercise of due care. If it was due care, considering all the circumstances surrounding the case, to leave the sidewalk and flagging, then he had a right to leave it if he was exercising due care in leaving it. You are to determine, considering all the evidence bearing upon what was being done there, where the place was that he was walking, what the barriers and the lights were, — everything bearing upon that question, — whether he was at the time exercising due care."

The judge also instructed the jury: "Some question has been raised about whether the defendant corporation was liable, provided it had made a contract with Gore & Co. to do this work. I do not understand that this railroad company had a right to relieve itself of its duty to the public, when it had permission to open those streets and to mend its ways or lay down new tracks, or that it can avoid or relieve itself from liability for carelessness, by letting out the contract. I therefore instruct you that if Gore & Co. put those rails where they were located, and that the sole cause of the accident was the putting them there and not properly guarding them, then that would not excuse the defendant, and it would be liable for this accident provided you find that the plaintiff was in the exercise of due care, and that Gore & Co. were negligent."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

M. F. Dickinson, (*G. D. Braman* with him,) for the defendant.

R. M. Morse, Jr., & *M. Morton, Jr.*, for the plaintiff.

HOLMES, J. The plaintiff's testator was injured by a fall in the street. He was seen to fall, and was picked up senseless at a point where some rails projected beyond a temporary barrier enclosing a place where the defendant was having a track laid. There was no evidence of any other possible cause of the fall. This warranted a finding that he tripped over the end of the rails.

The street was a public highway, and the jury very properly might find that it was negligent to allow the ends of the rails to project beyond the barrier, especially if they believed that it was dark at the place, as one witness testified, although the weight of the testimony looks the other way on paper.

There was testimony that the plaintiff's testator was walking in the usual way just before he fell. Taking into account what he had a right to assume with regard to that part of the street which was not enclosed by barriers, the jury was warranted in finding that he was using due care. *Learoyd v. Godfrey*, 138 Mass. 315, 324. *Lyman v. Hampshire*, 140 Mass. 311, 314. Indeed, if they believed that it was dark, they might have considered that the testator had been led into a trap. It is suggested that he was not crossing at a regular crossing. But his rights were not changed by a slight change in the pavement. He had a right to cross where he chose, if the jury thought that he used due care. *Raymond v. Lowell*, 6 Cush. 524. *Gerald v. Boston*, 108 Mass. 580.

It is argued that the work was done by an independent contractor. Assuming that there was evidence warranting that conclusion, we are of opinion that the fact would not exonerate the defendant. In some cases a party is liable notwithstanding the intervention of an independent contractor lawfully employed. A plain case is when he is made personally responsible by statute for the prevention of the cause of the damage complained of. *Gray v. Pullen*, 5 B. & S. 970. Thus it is settled in many States that a city charged with the duty of keeping the streets in repair is answerable for an improperly guarded excavation

made by a contractor; for instance, in building a sewer. *Storrs v. Utica*, 17 N. Y. 104. *Detroit v. Corey*, 9 Mich. 165. *Birmingham v. McCary*, 84 Ala. 469. *Logansport v. Dick*, 70 Ind. 65. *Houston & Great Northern Railroad v. Meador*, 50 Texas, 77. *Circleville v. Neuding*, 41 Ohio St. 465, 469. *Baltimore v. O'Donnell*, 53 Md. 110. *Robbins v. Chicago*, 4 Wall. 657, 679. *Water Co. v. Ware*, 16 Wall. 566. In the present case it would not stretch the words of the Public Statutes and of the defendant's charter very much to say that such a personal duty was imposed upon it. Pub. Sts. c. 113, § 32. St. 1853, c. 353, § 3. See *Quested v. Newburyport & Amesbury Horse Railroad*, 127 Mass. 204; *Osgood v. Lynn & Boston Railroad*, 130 Mass. 492; *Brookhouse v. Union Railway*, 132 Mass. 178; *Braslin v. Somerville Horse Railroad*, 145 Mass. 64.

But further, apart from statute, if the performance of a lawful contract necessarily will bring wrongful consequences to pass unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer at his peril to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. *Sturges v. Cambridge Theological Education Society*, 130 Mass. 414. *Stewart v. Putnam*, 127 Mass. 403, 407. *Gorham v. Gross*, 125 Mass. 232, 240. *Bower v. Peate*, 1 Q. B. D. 321, approved in *Dalton v. Angus*, 6 App. Cas. 740, 4 Q. B. D. 162, and 3 Q. B. D. 85. *Pickard v. Smith*, 10 C. B. (N. S.) 470. *Hole v. Sittingbourne & Sheerness Railway*, 6 H. & N. 488, 500. *Circleville v. Neuding*, 41 Ohio St. 465.

Laying the track for the defendant necessitated the digging up of the highway, and the obstruction of it with earth and materials. This obstruction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relations of horse railroads to the highway and the policy of the statutes, so far as the Legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created. *Veazie v. Penobscot Railroad*, 49 Maine, 119, 123. See also *Darmstaeter v. Moynahan*, 27 Mich. 188.

Exactly how far this principle shall be carried is a question of nicety. But on the whole we are of opinion that the present case falls within it, and does not resemble those where the cause of injury was an application of force to the person or property of the plaintiff by a transitory act or by a defect in machinery.

Exceptions overruled.

NEIL McFADDEN & others vs. JOHN J. MURPHY & others.

Bristol. October 24, 1888. — June 18, 1889.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN,
& KNOWLTON, JJ.

Equity Pleading and Practice — Parties — Voluntary Association — Dissolution — Rights of Minority.

A charitable voluntary association was formed to raise a fund to maintain sick and infirm members, and subsequently, by special statute, certain members named therein and their associates were incorporated to provide and maintain a building for its use, and for any other lawful purpose. The association voted to accept the charter, and assumed in some respects to be a corporation, yet continued to act as a voluntary association under its constitution. *Held*, that the association was not dissolved by the act of incorporation, or by any action of itself or of members with reference thereto.

The association formed a division of a national society, which prescribed and could alone change its constitution. An opposition national society was formed, and adopted an organization and constitution, which, while similar in their main features, differed in material respects from those of the old society. A large majority of the members of the association favored the new society and adopted its constitution, and attempted, in opposition to the minority, to take over to it the division as an organized body, and, claiming to be the original association, took possession of its property and maintained and carried on an organization as a division of the new society. The minority, who formed a quorum, thereupon proceeded to elect officers in place of those who had joined the new division, and continued to act as a division under the old constitution, and to maintain fraternal relations with the old national society. *Held*, that the majority ceased to be members of the old society; and that the old division was not dissolved, but continued to exist and was entitled to such property.

BILL IN EQUITY, filed in the Superior Court on October 6, 1885, to recover personal property alleged to belong to Division No. 1 of the Ancient Order of Hibernians, in Bristol County, Massachusetts. The case was heard before *Thompson, J.*, who

made a report of facts found by him, and of his conclusions therefrom, and ordered the bill to be dismissed; and the plaintiffs appealed to this court. The material facts appear in the opinion.

J. M. Morton, for the plaintiffs.

T. M. Stetson, (*H. K. Braley & T. F. McDonough* with him,) for the defendants.

W. ALLEN, J. The plaintiffs are the officers of a voluntary association, and bring this bill in behalf of themselves and all the other members of the association. The defendants are sued as officers of another similar association, and as representing all its members. The members of the societies are numerous, and the objection that they are not all made parties has not been pressed, and it is found that they are all represented.

The plaintiffs contend that they and those they represent constitute an association, which was formed in the year 1872, under the name of Division No. 1, Ancient Order of Hibernians, Bristol County, Massachusetts. One answer of the defendants is that the association became incorporated under the St. of 1874, c. 104, and was thus dissolved as a voluntary association. That act incorporated three individuals named, and their associates, under the name of the Ancient Order of Hibernians in Fall River, for the purpose of providing and maintaining a building in Fall River for the use of said order, and for any other lawful purpose. The purpose of the association was to raise a fund to maintain sick and infirm members. So far as the corporation had any connection with the association, it was in aid of and not a substitute for it, and the merger of the association in it, or the extinction of the association by it, would defeat the very object of its creation. The funds of the corporation could be devoted only to a building, and not to the support of its members or others. It is obvious that the association as a body had no authority to accept the charter and organize a corporation under it, or to merge itself in a corporation organized under it. Such action would be in violation of its constitution and of the rights of its members, and was not warranted by the act of incorporation. It is found that, although it voted to accept the charter, and in some respects assumed to be a corporation, yet it did in fact continue to act as a voluntary association under its constitu-

tion, and not as a corporation under the charter. It was not dissolved by the act of incorporation, or by any action of the association itself, or of its members in reference to the act.

In the year 1885 a breach arose among the members of the association, and two distinct organizations have since then been maintained, which are represented respectively by the plaintiffs and the defendants, and each of which claims to be the original association. The association was a division in a national society, which included national, state, county, and divisional organizations, and members of the divisions were members of the national society. The constitution was prescribed and could be changed only by the national organization. In that year a new national society was formed in opposition to the old one, and adopted an organization and constitution similar in its main features, but differing in material respects from it. A large majority of the members of the division favored the new society, and adopted its constitution and carried on an organization as a division under it, which is the one that the defendants represent. They attempted, against the opposition of the minority, to carry the association, as an organized body, from the old society and constitution to the new. It is plain that they had no authority to do this. The constitution was the compact which gave rights to individual members, and was the source and limit of the power of the association over its members. The majority could not by vote annul or change it. Any vote imposing upon the minority new obligations as a condition of membership, or changing the rights given to members by the constitution, or transferring their membership from the old national society to the new one, would be merely void. The new division could be organized only by individuals becoming members of it according to the new constitution, and when they became members of it they joined a different association from the old division, even though they carried with them its property, and adopted its officers and organization. Whether they could or could not be members of both at the same time, they could not by becoming members of the new one make that identical with the old one.

The next question is, whether the plaintiffs represent the association which existed before 1885. The defendants contend

that the old division was dissolved. The judge who reported the case finds the facts, and reports, as a conclusion from the facts found, that the minority acted in a manner not provided for and against established rules of the society, and that their action was illegal and their alleged reorganization was illegal, and that the division was dissolved and did not exist at the time of the filing of the plaintiff's bill. The facts reported from which these conclusions are drawn are, that when a large majority of the members and all the officers except the treasurer, having taken the obligation prescribed by the new constitution and acting as a division under it, but claiming to be the original division, excluded the minority from taking part in their proceedings, the minority proceeded to elect officers in place of those who had joined the new division, and continued to act as a division under the old constitution. The division as thus constituted by the minority, the plaintiffs and their associates, has since, as before, maintained its relations with, and been recognized by, the national society of which the division was originally a part. It was not illegal or irregular for the minority, being a quorum, to attend and act at meetings of the association in the absence of the majority. The meetings held by the majority under their new constitution were not meetings of the old association; the meetings that the minority attended were held under the old constitution, and there is no intimation that they were not duly and formally called and conducted. If the majority who formed the new association ceased to be members of the old one, no fact is found from which any illegality or irregularity in the proceedings of the minority can be inferred. If the majority continued to be members of the old division, they voluntarily refrained from acting as members or officers, and were not deprived by the minority of their rights as such. We do not find any action of the minority that seems to be irregular, unless in choosing officers to fill vacancies. If no vacancies existed, this action was irregular. The constitution and by-laws provide that the officers shall be chosen annually, and that if an officer is absent from a meeting an officer *pro tem* shall be chosen to fill his place. When an officer is absent from a meeting, and it is apparent that he will attend no meeting and do no act as an officer during his term, an officer chosen to take

his place for his unexpired term, and acting in the office, will serve to keep the organization from dissolution for want of such officer until the next regular election.

But we are of the opinion that the majority ceased to be members of the association, and that the proceedings of the minority who remained members were, so far as they appear, regular. By the constitution, members of divisions were members of the national society, and a member withdrawing from the national society ceased to be a member of his division, and any member whose dues were all paid could withdraw from the society by giving written or oral notice of his intention to do so. The purpose of the majority of the division, and of the division itself while the majority acted as members, to withdraw from the old society when they joined the new one, is obvious. Whatever was done by individuals, or by the division, with a view of joining the new national society, was with the intention of withdrawing from the old one. The individuals of the majority joined the new society and constituted a division within it, and, so far as their action could do it, withdrew from the old society and division. The report does not state the particular votes or acts of the association in relation to the change. But it does appear that the action of the majority was with the knowledge and assent of the association. We think this was sufficient notice of intention to withdraw from the society by the members of the majority, so that when they joined the new society, and constituted and acted as a division under its constitution, they ceased to be members of the society and division under the old constitution.

If it is said that the action of the majority will be construed to be a dissolution of the original division, it is a sufficient answer that its by-laws provide that it shall not be dissolved while fifteen members are in favor of its continuance. Without considering whether that action will bear, or the rights of the minority permit, such a construction, we think that the association organized as Division No. 1 in the year 1872 has not been dissolved, and that the plaintiffs and their associates constitute that association.

This suit is brought to recover the possession of personal property which belonged to the association, and which was taken

by the majority and claimed to belong to their new association. Under the constitution, each division is, in respect to raising and disbursing money, and to the ownership of property, an independent organization. The property belongs to the division, and the right to dispose of it is in the division, regulated and limited by provisions of the constitution which relate to the conduct of divisions within themselves. The right to the possession of the property in question was in the original association, and continues in it, unless by its action or the action of its members the right has been transferred to the new association. The property was held under the constitution for the use of the association and its members, and the majority could not transfer it with themselves to another association without violating the trusts upon which it was held and the rights of the minority who remained members. The association had no right or power to transfer its property to another organization; and it does not appear that it attempted to do so by any vote or action of the division. The property which belonged to the division at the time of the separation of the majority from it remains its property, and the plaintiffs and those they represent, constituting the original association, are entitled to the possession of its property.

Decree for the plaintiffs.

LEWIS D. ROBERTS vs. CITY OF BOSTON.

Suffolk. March 12, 1889. — June 18, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Waiver of Exception — Eminent Domain — Land Damages — Evidence —
Experts — Cross-examination — Re-examination.*

If evidence offered at a trial is objected to and excluded by the presiding judge as incompetent, and an exception is taken to this ruling, whereupon the objection is withdrawn, and the judge for that reason admits it, the party offering the evidence, who then declines to introduce it, has no ground of exception.

On the assessment of damages for the taking by a city of land with a building thereon for a court-house, evidence was put in by the owner of the cost of repairs and alterations made by him in the building. An expert for the city,

after testifying that he examined the building after it was partially taken down, describing its then condition, and that he formed an opinion from what he saw of the cost of both, was permitted to give his opinion as to what would have been a fair cost for the repairs and alterations which he saw. *Held*, that the evidence was properly admitted.

This expert, who for the first time gave his opinion of the value of the estate on cross-examination, after being asked various questions, also on cross-examination, as to the estate and one adjoining it with a view of showing that the estate in question was much the more valuable, was then asked by the owner, to show that his opinion was worthless, if he did not make up his mind that the adjoining estate was worth a certain sum, which was larger than that named by him as the value of the estate in question. *Held*, that the question was properly excluded.

Evidence offered by the city of the sales of neighboring estates similar to the estate in question, and similarly situated, one sale being about five months and the other more than twenty months after the taking, was *held* to be properly admitted.

The purchaser of one of such similar estates, who was an expert, and was called as a witness by the owner, testified that he had fixed a maximum limit to be bid therefor by his agent, and the owner then offered to show what this limit was, and that it exceeded the price paid, and that such purchaser was, on the day of the sale, offered a large advance on that price, and also what in his opinion was the value of such neighboring estate. *Held*, that the evidence was clearly incompetent.

This purchaser, who was a counsellor at law, testified in chief that he bought this estate in order to have a place to stop after the court-house was started, and, being asked on cross-examination his purpose in buying, and whether he did so because the court-house had been located near by, said that he bought it for an office, and because he had been near there many years and was wanted to the place; he was then asked, on re-examination, if all the object he had in buying was simply for an office, and whether the fact of the city's taking the court-house site was the only reason. *Held*, that these questions and the re-examination on the subject were properly excluded.

PETITION to the Superior Court for a jury to assess the petitioner's damages for the taking of land in Boston for a new court-house. Trial before *Pitman*, J., who allowed a bill of exceptions, which so far as material was as follows.

The petitioner's property consisted of a house and lot containing 3,032 square feet, and situated on the easterly side of Somerset Street, with a frontage of thirty-seven feet directly opposite the easterly end of Ashburton Place, which is forty feet wide and leads off from the westerly side of Somerset Street at that point. The petitioner's evidence tended to show that his property was worth when taken, on August 3, 1885, from \$55,000 to \$65,000, and that of the respondent that it was worth from \$35,000 to \$38,000. The estate was shown to have

peculiar advantages over other estates in the vicinity in location, being at the highest point on Somerset Street, the land and street descending each way from the same, and in having light and sun, and a wide outlook in the rear, and in upper stories especially, and in front down Ashburton Place.

There was evidence that the petitioner bought the property in 1880, at an auction sale, for \$21,700, and that he spent \$17,000 in repairs and in remodelling the house, which amount was wisely and judiciously expended; that in so doing he changed it from a dwelling-house to be occupied by one family to a house with separate suites of rooms on each floor, the same being made four stories in front and six in the rear, and adapted to first-class tenants.

Phineas A. Stone, an expert in real estate, testified that for many years he had been acquainted with the property, and with that in the vicinity; that, a few days before the petitioner bought it, he carefully examined and estimated the value of the property in question as the agent of a third person. The petitioner asked him, and proposed to show by him, what, in his judgment and opinion, the property was fairly worth at the time of the sale to the petitioner. The respondent objected, and the judge excluded the evidence as incompetent, and the petitioner excepted, whereupon the respondent's counsel said, "I will withdraw my objection. I don't want an exception." The petitioner's counsel then said, "I will not take it as a favor, after a ruling that it is incompetent evidence." The judge did not change his ruling that the evidence was incompetent, but said the evidence could be put in, as the respondent had withdrawn his objection; but the counsel for the petitioner then, and for the reason stated, declined to have the question answered. This occurred in the presence and hearing of the jury.

The respondent called, as an expert in real estate, Thomas J. Whidden, one of the court-house commissioners, and he testified that as such commissioner he examined the petitioner's house after the work of taking it down had begun; that all the heating apparatus and plumbing had been taken out, as well as the chimney-pieces and portions of the partitions, the city having sold all but the brick and stone in the building; that he examined the building as to what had been done by the petitioner,

and in reference to the amount of repairs that had been made; that he formed an opinion from what was left as to what there had been, so as to judge of the rest, but had not looked at the plans of the building. He was then asked this question: "What, in your opinion, would have been a fair cost for the repairs and alterations which you saw there?" The judge admitted the question, against the petitioner's objection, and the witness answered, "Ten thousand dollars was the sum I fixed as what it might cost to change it." The petitioner excepted.

Whidden was not asked by the respondent, and did not testify in chief as an expert as to the value of the estate, land, or buildings, except as above. He testified on cross-examination, that, in estimating what it would cost to do the work of remodelling and making the changes in the house, he arrived at a general estimate of their cost; that he thought it was his duty as a commissioner to estimate the damages, and he examined the property with that view, and made up his mind that the petitioner's estate was worth \$40,000. He was then asked whether he did not subsequently form the opinion that it was worth \$43,000, and was allowed to answer the question under objection: "Well, for the purpose of settlement, I don't know but I did. I can't remember." Whidden, on further cross-examination, said that he estimated the value of the land and that of the building separately; that he looked at an estate belonging to one Lamb, next adjoining the petitioner's on the south, and thought it had not been remodelled or changed; that the house on that estate and the petitioner's house were built at the same time; that he did not think the adjoining house any better than the petitioner's house before the latter was remodelled; that the petitioner's house was worth the most; that the two lots were worth the same per foot, but he thought there were more feet in the petitioner's estate; and that he should consider there was an advantage in the location of the petitioner's house over that adjoining, but "not much, not a great deal, say \$500." He was then asked, also on cross-examination, this question: "Did n't you make up your mind that the Lamb estate was worth \$43,000?" The respondent objected, and counsel for the petitioner said he was testing the value of the witness's opinion, and was not asking him about any offer. The judge

said it was a matter of judicial discretion, and in the exercise of that discretion excluded it; and the petitioner excepted.

The respondent, in introducing evidence of a sale on January 7, 1886, by public auction, of an estate on the southerly side of Ashburton Place, the third house from Somerset Street, and numbered 6 on Ashburton Place, offered to show that the estate consisted of a lot of land containing about fifteen hundred square feet, with a frontage of twenty-seven feet on Ashburton Place; that the front of the house on the lot was covered by mastic, and had twelve or fourteen rooms in it; that the house had been occupied as a dwelling-house, and was constructed for occupancy by one family; that the house, which was thirty or thirty-five years old, had not been remodelled, but was an excellent house, and in very good condition; and that the former owner, one Simpson, was a man of large means, and kept his house in fine order, with an elevator, and everything complete about it. The petitioner objected to the evidence as to what the Simpson house sold for, but the judge admitted it. The price paid for this property at the auction sale was then given as \$26,500.

The respondent, in introducing evidence of the sale by auction of another estate, on April 27, 1888, on Ashburton Place, offered evidence that it was situated at the corner of Ashburton Place and Somerset Street, on the northerly side of Ashburton Place, there measuring twenty-eight feet and containing about nineteen hundred square feet, covered by a brick building four stories high, with forty-two rooms, fitted up and used as a hotel; that an arched carriageway led from Somerset Street, under the rear part of the building, to houses beyond. The petitioner objected to the admission of the above evidence, but the court admitted it, and the price obtained was stated to be \$48,600. There was also evidence that the same estate was sold by public auction about two years before for \$52,000 or \$53,000, but the sale was not carried through because of an alleged defect in the title, and that the sale in question was of the same estate with the same title, and that the title was good, a warranty deed being given.

The petitioner objected to the admission of the evidence of either of these auction sales, because, among other things, of the

time and the dissimilarity in location and construction and character of the different lots, buildings, and estates, and on the facts. The judge ruled that it was entirely a matter of discretion with him, and admitted the evidence, saying the weight of it was entirely for the jury to determine; and the petitioner excepted.

It appeared in evidence that the estate numbered 6 Ashburton Place was bid off by the agent of Benjamin F. Butler, a counsellor at law, to whom a conveyance of the estate was made. The petitioner then called Mr. Butler, who was admitted to be an expert in real estate, as a witness, and he testified that he employed the agent in question to bid off the property, fixing a maximum limit to be bid by him thereon. The petitioner then offered to show what was the limit thus fixed, up to which the agent was authorized by Mr. Butler to bid off the property, but the judge excluded the evidence. The petitioner's counsel said he would state what this limit was which he expected to prove, if the judge would permit it; but the judge declined to allow him to do so, saying that he might state it in his bill of exceptions, which accordingly recited the limit to be \$30,000.

The petitioner contended that the evidence offered was competent as affecting the auction sale, and the price already admitted in evidence, and excepted to its exclusion.

The petitioner also offered to show, that immediately after the auction sale, on the same afternoon, Mr. Butler was offered an advance of \$5,000 on the price at which his agent had bid off the estate; but the respondent objected, and the judge excluded the evidence, and the petitioner excepted.

The petitioner also asked Mr. Butler, and offered to show, as affecting the sale as evidence, what, in his judgment and opinion, the estate bought by him was fairly worth in the market at the time of the sale, and what it was fairly worth at the time of the taking of the petitioner's land. The judge excluded the evidence, and the petitioner excepted.

Mr. Butler testified on direct examination that he occupied a part of the building bought by him as a law office, and rented the rest; that he had occupied offices on Pemberton Square, the site of the court-house, for about seventeen years; and that he "made this purchase in Ashburton Place in order to have a place to stop after the court-house was started." On cross-

examination, the witness, to the question, "You bought this place on Ashburton Place for what purpose?" replied, "I bought it for two purposes: one to occupy a portion of it as an office; and the other, to rent it as well as I could to help pay my rent." To the further question, "You bought it as an office because the court-house had been located in that vicinity?" the witness answered, "I could hardly say that; I bought it because I was wanted there; I had been there seventeen years,—very near there." On re-examination, the petitioner asked the witness, "Was all the object you had when you bought it simply for an office?" The judge, upon the respondent's objecting, stated that the witness had been originally examined on the subject, and excluded the question, but permitted the petitioner's counsel to ask him, "Have you any further answer to his [respondent's] question, as to the reason why you bought the property?" The respondent's counsel then said, "I did n't ask the reason," whereupon the petitioner's counsel said that he had asked the witness, "What was his object in buying it?" and the respondent's counsel then said, "I asked him as to whether he was governed by one reason,—the fact of the city taking the court-house site?" This question was then put by plaintiff's counsel: "Was that your only reason?"

The judge ruled that the petitioner had no right to re-examine the witness, and would not permit it to be done; and the petitioner excepted.

The witness was then permitted to make this explanation: "I think it is fair to everybody to say, so far as that is concerned, that if the court-house had gone somewhere else I should have stayed in my old office, and should not have bought anything,—if that will help either side."

The jury returned a verdict for the petitioner for the sum of \$45,243.07; and the petitioner, being dissatisfied therewith, alleged exceptions.

A. A. Ranney & A. Blume, for the petitioner.

T. M. Babson, for the respondent.

W. ALLEN, J. Several questions of evidence are presented by these exceptions.

1. Certain evidence offered by the petitioner was objected to by the respondent, and excluded as incompetent by the court,

to which ruling the petitioner excepted. The respondent then withdrew its objection to the evidence, and the court for that reason admitted it. The petitioner declined to put in the evidence, and insisted upon his exception. The exception was to the ruling excluding the evidence, and it necessarily failed when that ruling was reversed and the evidence admitted. The reasons of the court for admitting the evidence were not excepted to, and were not matter of exception, and could not affect the weight of the evidence with the jury. If the evidence was admitted by the court, and put in by the party, the jury would be bound and presumed to give the same effect to it as if it had not before been objected to and excluded. The reasons for excluding or admitting it were not to be considered by the jury.

2. After the petitioner had put in evidence of the cost of repairs and alterations that he had made in the building, the respondent was allowed to ask an expert what in his opinion would have been a fair cost for the repairs and alterations which he saw. The objection is, that the witness did not examine the building until after the work of taking it down had been commenced, and that it had been so changed and so much of it removed that he had not the means of forming an estimate of the cost. The witness testified as to the condition of the building when he made his examination, and that he did in fact form an opinion from what he saw of the cost of the whole. We think that the evidence was properly admitted.

3. A witness, one of the court-house commissioners, and an expert in real estate, who was called by the respondent to testify concerning the cost of improvements made in the house, but did not testify in chief as to his opinion of the value of the estate, testified on cross-examination as to his opinion of the value of the estate of the petitioner. He was also asked on cross-examination various questions concerning the petitioner's estate, and concerning an adjoining estate, with a view to showing that the petitioner's estate was much the more valuable, and was then asked if he did not make up his mind that the adjoining estate was worth a certain sum, which was larger than the sum which he had testified that in his opinion the petitioner's estate was worth.

This question was objected to by the respondent, and pressed by the petitioner, as competent to test the value of the opinion of the witness. The court, holding that it was matter of discretion, excluded the question. Had the opinion of the witness as to the value of the petitioner's estate been put in by the respondent in chief, and the question excluded been put on cross-examination as to that, though the evidence offered would have been immaterial and not competent to prove the value of the petitioner's land, yet the question might have been admitted, in the discretion of the court, on cross-examination, to test the witness. But the opinion of the witness as to the value of the petitioner's estate was put in by the petitioner himself, and the court properly refused to allow him to cross-examine the witness on collateral matters to show that the opinion was of no value.

4. The sales of other similar estates in the neighborhood were admissible. *Boston & Worcester Railroad v. Old Colony & Fall River Railroad*, 3 Allen, 142. *Paine v. Boston*, 4 Allen, 168. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115. *Whitman v. Boston & Maine Railroad*, 7 Allen, 813. *Chandler v. Jamaica Pond Aqueduct*, 122 Mass. 305. *Patch v. Boston*, 146 Mass. 52.

The lands sold were near to that of the petitioner, and similar to it, and similarly situated. One sale was about five months, and the other more than twenty months, after the taking of the petitioner's land. The mere lapse of time after the taking did not render the evidence of the sales incompetent, and, as the circumstances appear in the evidence, the discretion of the court seems to have been rightly exercised in admitting the evidence.

5. The petitioner called a witness who purchased one of the estates the sale of which was put in evidence by the respondent, and who was an expert in the value of real estate, who testified that he employed an agent to bid off the property for him at the sale, and fixed a maximum limit to be bid therefor. The petitioner offered to show what the limit was, and that the agent was instructed to bid for the property more than it was sold for. An exception was taken to the exclusion of this evidence. The petitioner also offered to prove that the witness was, on the day of the sale, offered a large advance on what he paid for the

property, and also what in the opinion of the witness was the value of the property, and exceptions were taken to the exclusion of the evidence. The sale was competent, as a fact tending to show the market value of the land, not as evidence of the opinion of the purchaser as to the value. The opinion of the witness of the value of the land, and the fact that he had offered more, and was willing to pay more, or had been offered more than the land sold for, are clearly incompetent. The fact that the witness was the purchaser at the sale makes no difference. *Rand v. Newton*, 6 Allen, 38. *Shattuck v. Stoneham Branch Railroad*, 6 Allen, 115. *Wyman v. Lexington & West Cambridge Railroad*, 13 Met. 316. *Davis v. Charles River Branch Railroad*, 11 Cush. 506.

6. It was said by the same witness during his examination in chief, that he made the purchase in order to have a place to stop after the court-house was started. On cross-examination he was asked for what purpose he bought it, and if he bought it because the court-house had been located in that vicinity, and answered in substance that he bought it for an office, and because he had been near there seventeen years and was wonted there. On re-examination the petitioner asked him if all the object he had when he bought was simply for an office, and whether the fact of the city taking the court-house site was the only reason. These questions, and the re-examination of the witness on the subject, were excluded by the court. The motive and purpose of the witness in making the purchase were immaterial; the proposed re-examination was as to immaterial matter. There was nothing in the testimony of the witness on the subject which could prejudice the petitioner, and the court properly refused to allow the subject to be further pursued by a re-examination upon it.

Exceptions overruled.

**WILSON G. HAMMOND vs. ALEXANDER B. PINKHAM
& another.**

Suffolk. March 13, 1889. — June 18, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Exceptions — Insolvent Debtor — Assignment in Trust for Creditors — Release.

An assignment by an insolvent debtor to a trustee for the benefit of creditors, and signed by them, containing no covenant by the creditors, nor agreement by them, express or implied, to release or discharge, or to receive anything in satisfaction of their debts, was *held* no bar to an action by such a creditor to recover the amount of his debt above a dividend received by him from the trustee.

CONTRACT against Alexander B. Pinkham and Cornelius A. Russell, doing business under the name of Pinkham and Russell, on two promissory notes, dated March 22, 1886, and April 28, 1886, payable to the order of the plaintiff sixty and ninety days after date respectively, and signed "Pinkham and Russell."

At the trial in the Superior Court, without a jury, before *Sherman, J.*, the plaintiff introduced the notes in evidence, and rested. The defendants thereupon introduced in evidence a written instrument, signed by the defendants and the plaintiff, and by Otis Eddy and others, which recited the transfer of all the property of the defendants, as party of the first part, to Eddy, as party of the second part, in trust, to dispose of the proceeds of the said property in the manner following, viz.:

"First. To pay all such debts as by the laws of the United States or of this Commonwealth are entitled to a preference in such cases, including claims of persons who have valid liens or other security.

"Second. To pay the costs and charges of these presents, and the expenses of executing the trusts declared in these presents.

"Third. To distribute and pay the remainder of the said proceeds to and among all the parties of the third part, ratably, in proportion to their respective debts; and if there should be any surplus after paying all the parties of the third part in full, then in trust.

"Fourth. To pay over such surplus to the party of the first part, his executors, administrators, or assigns.

"And the party of the first part hereby constitutes and appoints the party of the second part their attorney irrevocable, with power of substitution, authorizing him in the name of the party of the first part, or otherwise, as the case may require, to do any and all acts, matters, and things to carry into effect the true intent and meaning of these presents which the party of the first part might do if personally present. And the party of the second part, hereby accepting these trusts, covenants to and with each of the other parties hereto to execute the same faithfully. And the party of the first part hereby covenants with the said trustee, from time to time, and at all times when requested, to give him all the information in his power respecting the assigned property, and to execute and deliver all such instruments of further assurance as the party of the second part shall be advised by counsel learned in the law to be necessary."

The defendants then introduced evidence, that, at about the date of the above instrument, a meeting of their creditors was called, at which a statement of the financial condition of the firm of Pinkham and Russell, which was insolvent, was made; that they proposed by the above instrument to transfer and convey all their property to Eddy, in trust for the benefit of their creditors; that they did not wish to go into insolvency, but were willing to complete the execution of the instrument, and deliver all their property to the trustee, if the creditors would accept the same in full satisfaction and discharge of their debts; that the defendants' counsel stated that by signing such instrument the creditors would discharge and release the defendants from their liability to them; that a question arose as to the amount and validity of certain liens on the defendants' property, and a committee was appointed to submit such question of the validity of these liens to a third person; that Eddy and a number of the creditors, including the plaintiff, then and there signed the instrument; that at an adjourned meeting of such creditors the committee reported that the liens were valid, and the clause "including claims of persons having valid liens or other security" was without objection inserted by interlineation in the instrument; that the plaintiff was present at both meet-

ings, neither note having then matured; and that the defendants' counsel stated at the adjourned meeting, that, if the above instrument was signed, it was a discharge of all claims, whatever dividend the estate might pay.

There was evidence that the plaintiff had received ten per cent of the amount of his claim by a check of the trustee, dated August 4, 1886; but there was no evidence that the plaintiff made any statement in relation to such payment by the trustee, and the plaintiff denied that he ever heard the defendants' counsel state, that, by signing the instrument, he was to release the defendants from his claim; and he gave further evidence tending to prove that he had never released them, nor agreed so to do.

The defendants asked the judge to rule: "1. that it could be shown by parol that the consideration for the assignment to Eddy was the discharge of the indebtedness of the various creditors, notwithstanding the consideration expressed in the deed; 2. that the absence of any covenants in the instrument, on the part of the creditors, created an ambiguity in the instrument, which could be explained by parol evidence; 3. that, by a proper construction of the deed, the plaintiff agreed to receive a *pro rata* share of his claim in payment or accord and satisfaction of the whole; 4. that by signing this instrument the plaintiff is estopped from denying that he assented to such discharge, settlement, and accord and satisfaction; 5. that the receipt by the plaintiff from the trustee of a percentage of his claim, a *pro rata* share, without comment or protest, was evidence of accord and satisfaction of the claim; 6. that, upon all the evidence in the case, judgment ought to be given for the defendants."

The judge declined so to rule, and ruled as follows: "It is competent for the defendants to prove, if they can, that the plaintiff, in consideration of the assignment to Eddy, agreed by parol to receive a *pro rata* share of his claim in payment or in accord and satisfaction of the whole, and the evidence of what was done and said at the meetings when he was present, and the circumstances under which he received a percentage of his claim, are all competent evidence bearing upon that question."

The judge found as facts that the plaintiff by his conduct consented to the interlineation referred to in the assignment, and that the plaintiff did not agree by parol to release the defendants

from the payment of his claim in full ; and ruled that, as matter of law, the plaintiff had not released his claim in writing by signing the above instrument.

The judge found for the plaintiff for the amount of the notes less the amount of the dividend received from Eddy ; and the defendants alleged exceptions.

L. M. Child, for the defendants.

S. D. Charles & W. B. Owen, for the plaintiff, were not called upon.

W. ALLEN, J. The instrument is plain and unambiguous, and contains no covenant on the part of the creditors of these defendants, and no agreement by them, express or implied, to release or discharge their debts, or to receive anything in satisfaction of them. The rulings prayed for by the defendants were properly refused, and the ruling that the plaintiff did not release his claim by signing the indenture was correct.

The defendants cannot except to the ruling of the court that it was competent for them to prove that the plaintiff agreed by parol to receive his share under the indenture in satisfaction of his debt, nor to the finding as a fact, on the evidence, that he did not so agree.

Exceptions overruled.

NONANTUM WORSTED COMPANY vs. HOLLISTON MILLS.

Suffolk. March 14, 1889. — June 18, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Insolvent Debtor — Assignment in Trust for Benefit of Creditors.

An assignment by a corporation to a trustee, after reciting its inability "to pay its debts," and its desire to convey its property for the benefit of its creditors without any preference, stipulated that such property should be distributed ratably among them with legal priorities ; that the attachments of creditors party thereto should be dissolved, and that no such creditor should attach or levy an execution on its property ; that no holder of any debt, upon which another was absolutely or contingently liable, should by signing it release such other person, or in any way impair his liability, but should reserve all rights and remedies against him, and "the same may be as fully enforced as if these presents had not been executed." *Held*, that the assignment did not operate to discharge

the debts of the corporation, and was no bar to an action by a creditor, pending the carrying out of the assignment, as a preliminary to enforcing the statutory liability of its officers and stockholders.

CONTRACT upon two promissory notes, dated respectively November 23, 1887, and December 3, 1887, each payable four months after date to the plaintiff's order, and signed by the defendant. Writ dated April 11, 1888. Trial in the Superior Court, before *Lathrop, J.*, who reported the case for the determination of this court, in substance as follows.

The plaintiff introduced the notes in evidence, and rested. The defendant relied in defence upon an assignment under seal, dated February 1, 1888, made by it to a trustee for the benefit of its creditors, the execution of which by the parties before the date of the writ was admitted. This assignment, which consisted of an indenture under seal of three parts, provided for the transfer of all the property of the corporation to the trustee:

"In trust, to hold, manage, and take care of the same, and to convert the same into money, and for that purpose to collect said claims, debts, and choses in action, with power to compound for any of them, taking such part or thing for the whole as said party of the second part shall deem expedient, and to sell, by private contract or public auction, for cash or on credit, and with or without guaranty of payments, and upon such terms, and at such time or times, place or places, and in such manner, as said party of the second part shall see fit, the whole or any part of said property, and to assign, transfer, and convey the property so sold to the purchaser or purchasers thereof, by good and sufficient deed or deeds, or other conveyances or transfers, and receive the proceeds of said sales. The trustees may manufacture and finish such raw material and goods in the process of manufacture as said company has now in its possession, and for that purpose may pay for such labor, and purchase and pay for such supplies, as he may deem necessary or proper. And upon the further trust to apply and dispose of all the net proceeds of the sales of the property hereby assigned or conveyed, and also the net proceeds from the collection of claims, debts, and choses in action hereby assigned, as follows, to wit: . . .

"To distribute and pay the remainder of said proceeds to and among the parties of the third part ratably in proportion

to the amounts owing by said Holliston Mills to each of them respectively, (whether now or hereafter payable,) made up as cash at the date of these presents, and interest added or rebated accordingly, without preference or priority, except that such creditors shall be preferred, and in such amounts, as is provided by the statutes of Massachusetts in regard to insolvent corporations, such payments to be made when and as often as the funds in the hands of the trustee will warrant, until the whole of said claims, with interest thereon from the date of these presents, shall be paid in full. . . .

“And it is further expressly provided and agreed, that no holder of any promissory note, draft, bill of exchange, check, or other debt to which the said Holliston Mills is a party, whether as drawer, indorser, guarantor, surety, maker, joint maker, or otherwise, and upon which any other person, firm, or corporation is absolutely or contingently liable, whether as drawer, indorser, guarantor, surety, maker, joint maker, or otherwise, does by signing or executing these presents release or discharge such other person or persons, firm, or corporation therefrom, or in any manner impair his or their liability thereon, but hereby fully reserves all rights and remedies thereon against any and all such other person or persons, firms, or corporation; and the same may be as fully enforced as if these presents had not been executed. . . .

“And it is hereby further expressly agreed, that all attachments made by any of said creditors shall, on their becoming parties hereto, be immediately dissolved, and no creditor party hereto shall hereafter make any attachment or levy any execution on said property or any part thereof, and the trustee, in case any existing attachment on said property shall be dissolved as aforesaid, may pay all costs and expenses incurred by the plaintiff in any suit in which such attachment is made.

“Provided always, and it is further declared and agreed, that, in case a petition under the insolvent laws of the Commonwealth of Massachusetts shall within six months from the day of the date hereof be filed in the proper court against said Holliston Mills before all the property hereby assigned and conveyed shall have been sold and converted into money, and the proceeds thereof disposed of and distributed pursuant to the provisions of

this instrument, and a warrant in insolvency shall be issued by the court upon such petition, then all of said property and proceeds which may then remain in said trustee undisposed of and undistributed pursuant to the terms of this instrument shall be by said trustee surrendered, assigned, transferred, and conveyed to the person or persons who shall have been chosen and qualified assignee or assignees of the estate of said Holliston Mills, under said insolvent laws, but without disturbing, affecting, or impairing the title to any property previously sold, assigned, transferred, or conveyed by said trustee, or any collections made by him, or any proceeds which shall have been previously disposed of and distributed under this instrument, or any acts previously done thereunder by said trustee.

"The parties of the third part hereto hereby, severally and respectively, accept the provisions and trusts herein contained for their benefit."

No further evidence was offered. In answer to a question by the judge, the counsel for the plaintiff stated that the action was brought for the purpose of enforcing the statutory liability of the directors of the corporation.

The judge ruled that, by reason of the assignment, the action had been prematurely brought, and directed a nonsuit.

If the ruling was sustained, or the plaintiff could not maintain the action, the plaintiff was to be nonsuit; otherwise, judgment was to be entered for the plaintiff.

J. Fox, for the plaintiff.

H. G. Nichols, for the defendant, contended that the execution of the assignment deprived the plaintiff of the right to sue the defendant for the recovery of its debt while the assignee was in process of winding up the estate in pursuance of the provisions of the assignment, there being no claim that the defendant had failed to do anything by it to be done, or that the assignee had in any respect failed in his duty, under the terms of the assignment; and cited *Tatlock v. Smith*, 3 Mo. & P. 676; *Good v. Cheesman*, 2 B. & Ad. 328; *Gibbons v. Vouillon*, 8 C. B. 483; *Mathews v. Taylor*, 2 M. & G. 667; *Eaton v. Lincoln*, 13 Mass. 424; *Bigelow v. Baldwin*, 1 Gray, 245.

W. ALLEN, J. The defendant made an assignment to a trustee for the benefit of its creditors, by indenture to which the

plaintiff became a party. The question is, whether the debts owed to creditors who were parties to the indenture were discharged by it. It seems plain that they were not.

The purpose of the debtor in making the assignment was not to procure a discharge. The recital is that the "Holliston Mills is at present unable to pay its debts at maturity thereof, and it is desirous to convey all its property for the benefit of its creditors, without preference or priority, one over the other or others." The assignment is of all its property, and it is to be distributed, ratably to the creditors, with such priorities as are provided by the insolvent law of this Commonwealth. It is agreed that attachments made by creditors shall be dissolved on their becoming parties to the indenture, and that no creditor party shall make any attachment or levy any execution on the property; but no other agreement by creditors not to sue is expressed, and we cannot see that any is implied.

As the debtor is a corporation, and as its property cannot be touched in a suit by such a creditor, nor the management and distribution of the property be affected by such a suit, it is difficult to see how an agreement not to sue can be implied. There is an obvious reason why it should not be. A suit and judgment against the corporation are necessary, in order to enforce the statutory liability of its officers and stockholders for its debts. The question is not whether the creditor will be presumed to have given up his right to sue a penniless corporation, but whether he has given up his remedy against a surety for the debt. That this was not the intention of the parties is not only to be presumed, but is expressed in terms which alone would be sufficient to preserve the right to sue the corporation. They agree that no holder of any debt of the corporation upon which any other person is absolutely or contingently liable shall, by executing the indenture, release or discharge such other person, or in any manner impair his liability, but shall reserve all rights and remedies against him, and "the same may be as fully enforced as if these presents had not been executed."

The indenture, in its meaning and effect, bears a close resemblance to an assignment by a corporation under the insolvent laws of this Commonwealth, which are several times referred to in it. It assigns all the property of the corporation to be dis-

tributed among its creditors; it dissolves attachments on the property, and protects it from being taken on attachment or execution; it does not discharge the debtor or release the debt; it preserves the remedy against officers and stockholders of the corporation, and what is part of that, the right to obtain a judgment against the corporation. See *Coburn v. Boston Papier Maché Manuf. Co.* 10 Gray, 243; *Johnson v. Somerville Dyeing & Bleaching Co.* 15 Gray, 216. *Judgment for the plaintiff.*

SUFFOLK SAVINGS BANK vs. CITY OF BOSTON.

Suffolk. March 14, 1889. — June 18, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Coupon Bond — Calling for Redemption — Collateral Agreement —
Notice — Estoppel.*

Municipal bonds, each providing for the payment absolutely of a certain sum on a day named, with interest "payable semiannually on presentation of the interest warrants hereto attached," recited that they were issued under an order specified of the city council. The city treasurer, as instructed by the duly authorized committee of finance of the council, made with bankers an agreement to negotiate the bonds, which provided for calling annually a certain number of them by lot for redemption. A purchaser of such bonds, who had no knowledge of the agreement, or that by it they were subject to be called, sold them to a savings bank, and the bonds subsequently were called in for redemption, and payment refused of coupons maturing thereafter. *Held*, that the savings bank succeeded to an unimpeachable title from such purchaser, and, even if it had notice of the agreement, could enforce the bonds according to their tenor, and recover upon the interest warrants.

CONTRACT upon two interest coupons attached to bonds issued by the defendant city. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, the material part of which appears in the opinion.

T. M. Babson, for the defendant.

C. A. Welch, for the plaintiff.

MORTON, C. J. This is an action on two coupons, or interest warrants, which were annexed to two bonds issued by the city of

Boston. Each bond is an absolute promise to pay to the bearer "on the first day of July, 1899, the sum of one hundred pounds sterling, with interest at the rate of five per cent per annum, payable semiannually on presentation of the interest warrants hereto attached," and recites that this is "a stock created in pursuance of an order of the city council, approved the first day of June, 1869." Each coupon or interest warrant is an absolute promise to pay to the bearer, on a given day, the sum of two pounds ten shillings sterling, for interest. The order of June 1, 1869, referred to in the bonds, authorizes the committee on finance to consolidate several loans "into one loan to an amount not exceeding five million dollars (\$5,000,000), to be styled and called the 'Consolidated Street Improvement Loan.'" Acting under this order, the committee on finance issued bonds to the amount of five million dollars, all in the same form, of which the bonds held by the plaintiff are a part. The city admits that this was within the authority conferred upon the committee on finance. Their action was as follows. The committee, on July 31, 1869, passed a vote authorizing the city treasurer to issue sterling bonds for the "Consolidated Street Improvement Loan," and to consign them for sale, under such limits as might be fixed from time to time by the committee, to Messrs. Baring Brothers & Co., and on October 15, 1869, it "voted, that the city treasurer be, and he hereby is, authorized to make such a disposition of the sterling bonds to be issued for the 'Consolidated Street Improvement Loan' as in his opinion may be for the interest of the city."

The defendant offered to show that the treasurer, acting under this authority, entered into a written contract with Baring Brothers & Co., and in compliance with the contract Baring Brothers & Co. offered the bonds for public subscription, and the parties who originally purchased them bought and paid for them in accordance with the terms of said contract; that since January 1, 1871, the Barings have called annually one per cent of the bonds, and have thoroughly advertised said calling and drawing, so that the fact that the said bonds were liable to be redeemed before maturity was well known in financial circles in England, and that for this reason the bonds commanded a price less than the price of similar bonds not subject to annual

redemption by lot; and that the bonds held by the plaintiff had been drawn and called in for redemption and payment, as provided in said contract, prior to the maturity of the coupons sued on.

The second article of the contract referred to is as follows: "A sum of at least eight thousand pounds, being one per cent on the whole amount of the bonds, shall be set apart annually from and after first January, 1870, as a sinking fund for the said bonds, and shall be increased successively by the whole amount of interest corresponding to the bonds from time to time cancelled. The bonds to be redeemed at the counting-house of the said Messrs. Baring Brothers, and the redemption shall be annual, to commence on first January, 1871, by purchases at the market value, if the price be not above par, or by lot if the price be above par. Any portion of this loan which may remain uncanceled on first July, 1899, shall be repaid at that date and at par." In regard to this instrument, it is to be observed that it does not purport to be, and is not, a contract between the city and those who might become the bearers or holders of the bonds. It is a collateral contract between the city and Baring Brothers, entered into for the purpose of negotiating or placing the loan upon the market. It does not provide that the liability to annual redemption by lot of a part of the loan shall be a condition of the bonds to be issued; and the bonds which were subsequently issued contained no such condition, and no reference to the collateral contract, but were unconditional promises to pay the amount of each on the first day of July, 1899. Any person who bought the bonds in good faith, without knowledge of the contract with the Barings, could, without doubt, enforce them against the city according to their tenor. Whether the original subscribers to the loan, who took the bonds with notice of this collateral contract, would be affected by it, we need not inquire. We are concerned only with the rights of the plaintiff in this suit. It is admitted that the plaintiff bought its bonds of Blake Brothers & Co., in Boston, and that they had no knowledge of the collateral contract, or that the bonds were by it liable to annual redemption. Nor can it be claimed that they had any constructive notice of it. It is true, as stated by Chief Justice Waite in *McClure v. Oxford*,

94 U. S. 429, that "every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements," — he must see at his peril that the bonds are legally issued. Any purchaser of the bonds in question, if he examined the records of the city, would see that the city treasurer had full authority to issue the bonds in the form in which they were issued. We do not think that he was bound, in the exercise of reasonable diligence, to go further, and look for an independent private agreement, which is unusual, and which he has no reason to suppose exists. The fact that such an agreement exists, and is entered on the records of the committee on finance, cannot justly be held to be constructive notice to him. It follows that the title of Blake Brothers & Co. in these bonds was unimpeachable, and they had the right to enforce them according to their tenor. It does not appear that the plaintiff had notice of the contract with Baring Brothers, though perhaps there is some evidence to go to a jury upon this point. But it is not material, for, even if the plaintiff had notice, it by its purchase took the unimpeachable title and right of Blake Brothers & Co.

If a purchaser with notice could be held to have a qualified title to the bonds, and to hold them subject to the condition that they might be redeemed before maturity, which we do not decide, it could only be upon the ground that he could not set up an absolute title without practising a fraud upon the city, and that therefore he is estopped from doing so. But a purchaser without notice would not be subject to such an estoppel, but takes a title purged of any fraud or infirmity. This title he can transfer, and it is immaterial whether the person to whom he transfers it knows of the taint or infirmity or not. Otherwise, though he holds a perfect title in himself, it would be destroyed or impaired in value. This principle is established by many authorities. *Trull v. Bigelow*, 16 Mass. 406. *Boynton v. Rees*, 8 Pick. 329. *Glidden v. Hunt*, 24 Pick. 221. *Flynt v. Arnold*, 2 Met. 619. *Grout v. Hill*, 4 Gray, 361. We are therefore of opinion, that the plaintiff is entitled to recover upon the coupons or interest warrants according to their tenor.

Judgment for the plaintiff.

CHARLES S. LINCOLN vs. BENJAMIN F. PERRY & others.

Suffolk. November 23, 1888. — June 19, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.*Will — Devise of Life Estate — "Heirs at Law" — Husband as Heir of
Wife — Extrinsic Evidence.*

A testator, who was born and lived awhile in another State, but was domiciled here when he executed his will, and thenceforth until he died in 1877, gave one fourth part of the residue of his estate, consisting of personalty here and of land in that State, to his brother's wife, who was domiciled there with her husband, and there died in 1884, "to have and to hold the same to her during her life, and at her decease to her heirs at law and their heirs and assigns forever." A trustee was appointed here and in such other State, who duly sold the land and held the proceeds. *Held*, but only as to the personalty which remained at her death, that it should go to her heirs at law as determined by the statutes of distribution in force here at her decease, and that her husband must be considered as her heir.

Evidence of a counsellor at law, under whose advice the will was drawn, that the testator did not wish to have his brother receive anything under the gift to his brother's wife and her heirs at law, was *held* to be incompetent.

BILL IN EQUITY, filed April 13, 1886, by the trustee under the will of George W. Perry, against the husband and the blood relatives and heirs at law of Judith E. Perry, for instructions as to the disposition of the remainder of a gift to her for life. The case was heard by *W. Allen, J.*, who reported it for the consideration of the full court, in substance as follows.

George W. Perry, of Malden in this Commonwealth, died on April 24, 1877, leaving a will, which was duly admitted to probate on May 26, 1877, and was, with the exception of parts merely formal, as follows:

"First. Unto my wife, Martha Jane Perry, my homestead estate where I now reside, situated on Florence Street in said Malden, to have and to hold the same to her and her heirs and assigns forever; also unto my said wife all my household furniture and utensils, including all the chattels in my dwelling-house; also unto my said wife the sum of fifteen hundred dollars per annum, during her life. It is my will that the foregoing gifts to my wife shall be in full of all her interest in my estate and

in lieu and bar of dower. It is also my will that if any of the above named property should remain undisposed of by my wife at her decease, the same shall descend and belong to my heirs at law.

"Second. Unto my mother, Abigail Perry, the sum of six hundred dollars per annum, during her life.

"Third. Unto my sister, Eliza Bates, my lot of land and the buildings thereon situated in Keene in the county of Cheshire and State of New Hampshire, to have and to hold the same to her and her heirs and assigns forever.

"Fourth. Unto Judith Perry, the wife of my brother, Benjamin F. Perry, the sum of five hundred dollars.

"Fifth. All the remainder and residue of my estate, real, personal, and mixed, of which I may die seised or possessed, or to which I may be entitled at the time of my decease, shall be divided into four equal parts, which I give, devise, and bequeath as follows, to wit: one of said parts to my brother, Benjamin F. Perry, to have and to hold the same to him during his life, and at his decease to his heirs at law and their heirs and assigns forever; another of said parts unto Judith Perry, the wife of said Benjamin F. Perry, to have and to hold the same to her during her life, and at her decease to her heirs at law and their heirs and assigns forever; the remaining two parts to my niece, Sarah Jane Harvey, to have and to hold the same to her during her life, and at her decease to her heirs at law and their heirs and assigns forever.

"Sixth. I nominate and appoint my wife, Martha Jane Perry, to be the executrix of this my last will and testament, and I direct that she shall not be required to furnish any sureties on her probate bond."

The only question was who were entitled to that portion of the estate given for life to Judith Perry, under the fifth clause of the will.

The testator was domiciled in Malden when the will was executed, and thenceforth until he died. He was born in Keene, New Hampshire, where he resided in his youth, and where his mother, Abigail Perry, and his sister, Eliza Bates, resided at the time of the execution of the will, and in which place the testator at the time of the execution of the will owned two

pieces of real estate, which he retained and owned at his death, one of which he devised to his sister Eliza, and the other fell into the residue of his estate. Abigail Perry died before the testator, at Troy, where she had lived for several years in the family of Benjamin F. and his wife, Judith E. Perry, who was the person called Judith Perry in the will. On December 23, 1879, the plaintiff was duly appointed trustee under the will to administer the trusts created thereby other than those relating to the real estate in New Hampshire, which trusts related to personal property, amounting to about \$35,000.

In 1881 the plaintiff was also duly appointed trustee under the will in New Hampshire, and upon due proceedings had sold the real estate there situated, which consisted of a wood lot, and could not advantageously be divided, and held the proceeds, amounting to about \$3,000, in his hands undisposed of.

No part of the personal property in this Commonwealth has ever been invested in real estate; and ever since the sale of the real estate in New Hampshire the whole property of the gift under the fifth clause of the will has been personal property.

During the life of the testator's widow, the plaintiff as such trustee duly paid to her from the income of the property not devised absolutely the sum of \$1500 per annum, paying the remainder as provided in the will; and after the death of the widow the entire income of such property to those entitled to it under the will, including Judith E. Perry so long as she lived.

Judith E. died at Troy, in the State of New Hampshire, on January 24, 1884, where she and her husband had been domiciled and lived together as husband and wife for over thirty years immediately preceding her death.

Judith E., who never had a child, left surviving her Benjamin F., her husband, a brother and a sister, and the issue of deceased brothers and of a sister. She also left a will, which was duly admitted to probate, by which she gave all her property, consisting only of personalty, to her husband, the provisions of which will he did not waive.

Benjamin F. Perry, who died after the filing of the bill, never had a child, and his heirs at law, who were made parties defendant, consisted of brothers, sisters, a nephew, and a niece.

William S. Stearns, counsellor at law of forty years' practice

in the courts of this Commonwealth, called by the blood relatives of Judith E., testified, under objection, that the testator was his client, and that the will was drawn up by him or under his direction, after a consultation with the testator as to what persons he desired should take or have the remainder of the property of which Judith E. had the life interest; that the testator told him, at the time of the execution of the will, that he wished such remainder to go to Judith's blood relatives, and not to her husband; that the witness then instructed the testator that the term "heirs at law," as applied to Judith E. in the fifth clause, would give such remainder to her blood relatives in distinction from her husband, and that he wrote the term "heirs at law" in such clause to carry out the intention of the testator that it should go to her blood relatives. The judge found the facts to be in accordance with such testimony, and reserved the question of the competency of the testimony, or any part of it, for the full court.

The General Statutes of New Hampshire of 1878, c. 193, § 5, c. 202, § 16, and c. 203, §§ 1, 6, and the cases decided by the Supreme Court of that State, of *Richardson v. Martin*, 55 N. H. 45, and *Wilkins v. Ordway*, 59 N. H. 378, were introduced in evidence.

The case was argued at the bar in November, 1888, and afterwards was submitted on the briefs to all the judges.

E. G. McInnes, for the plaintiff, read the papers in the case.

H. G. Parker, for the heirs at law of Benjamin F. Perry.

J. B. Richardson, for the blood relatives of Judith E. Perry. In a gift of real and personal estate made by the same words, one construction only will be given to it; and in such a gift that construction will be given which is the proper one to give in respect to the gift of real estate. *Clarke v. Cordis*, 4 Allen, 466. *Lombard v. Boyden*, 5 Allen, 255. *Fabens v. Fabens*, 141 Mass. 400. *Gwynne v. Muddock*, 14 Ves. 488. In such a gift of real and personal estate to "heirs at law," that term means relatives by blood. *Clarke v. Cordis*, 4 Allen, 466, 480. *Putnam v. Gleason*, 99 Mass. 454. *Merrill v. Preston*, 135 Mass. 451. *Fabens v. Fabens*, 141 Mass. 395. *Cummings v. Cummings*, 146 Mass. 501, 507. *Smith v. Butcher*, 10 Ch. D. 113. The case at bar is not a case of substitution, like *Vaux v. Henderson*, 1 Jac. & W.

388, or *Doody v. Higgins*, 9 Hare, App. xxxii., or *Keay v. Boulton*, 25 Ch. D. 212; nor is it controlled by *Lavery v. Egan*, 143 Mass. 389, or by *White v. Stanfield*, 146 Mass. 424. By the Pub. Sts. c. 124, § 1, it is only where the wife dies, having had issue which has died before her, that the husband takes her real estate to the amount of five thousand dollars; which was the case in *Lavery v. Egan*. In *White v. Stanfield* the property was all personal. The testimony of Mr. Stearns was competent for the purpose of proving the fact that he was consulted by the testator, and that the testator was instructed as to the meaning of the term "heirs at law."

C. ALLEN, J. The material portions of the residuary clause of the testator's will are as follows: "All the remainder and residue of my estate, real, personal, and mixed, of which I may die seised or possessed, or to which I may be entitled at the time of my decease, shall be divided into four equal parts, which I give, devise, and bequeath as follows, to wit: one of said parts to my brother, Benjamin F. Perry, to have and to hold the same to him during his life and at his decease to his heirs at law and their heirs and assigns forever; another of said parts unto Judith Perry, the wife of said Benjamin F. Perry, to have and to hold the same to her during her life, and at her decease to her heirs at law and their heirs and assigns forever." The testator's birthplace was in Keene, New Hampshire, where he resided in his youth, and where at the time of the execution of his will he owned two pieces of real estate, which he retained and owned at his death; but he was domiciled in Malden, Massachusetts, when his will was executed, and thenceforth until he died. The testator died on April 24, 1877, and his will was dated October 10, 1874. Judith Perry died at Troy, New Hampshire, on January 24, 1884, where for over thirty years immediately preceding her death she and her husband, Benjamin F. Perry, were domiciled, and lived together as husband and wife. The property given by the residuary clause consisted of personal property only in this State, and a piece of land in said Keene, which the testator owned at the time of the execution of the will, and ever after until his death. Upon these and the other facts reported, the question is, Upon the death of Judith Perry, who became entitled to the fourth part

of the property given in the residuary clause, which she enjoyed the benefit of during her life? In other words, Who are to be deemed her heirs at law, within the meaning of the will?

These questions, so far as we are called upon to deal with them, relate only to the disposition which the trustee is to make of the personal estate given by the residuary devise. There was no real estate in Massachusetts which was included in the residuary devise. The plaintiff, having been appointed trustee in New Hampshire for the purpose of selling the land there situated, and having made sale of it accordingly, will account for his disposition of the proceeds of such sale in the courts of that State.

A majority of the court has arrived at the following conclusions in reference to the disposition of the personal property over which we have jurisdiction.

1. The testator has appointed a common destination for all of said fourth part of the residue of his property, whether the same is real or personal. The words should not be construed to mean that the real estate should go to one set of persons, and the personal estate to another; but the whole residue must go to the heirs, according to the meaning which that word bears at common law, namely, those who would be entitled to succeed to real estate in case of intestacy. *Fabens v. Fabens*, 141 Mass. 395, 399, 400.

2. The persons who would be entitled to succeed to real estate in case of intestacy must be ascertained and determined according to the laws of Massachusetts. It has been argued, that the term "heirs at law" should be held to mean those who would be the actual heirs of Judith upon her decease, this being determined by the place of her residence; and that therefore the determination who should take as her heirs should be made according to the laws of New Hampshire. But the question after all is, What is the meaning of the testator's words? and we are brought to the conclusion that the true meaning is, to designate a set of persons who were to take the estate upon Judith's death, and that those persons are styled her heirs at law. This set of persons would not fluctuate with any changes of residence that she might make. The testator would probably not be familiar with the laws of different States. He lived here,

his will was drawn here by a Massachusetts lawyer, and it was executed here. The laws of Massachusetts are those with which presumably he would be best acquainted. The fact that he formerly lived in New Hampshire is immaterial. It is not disclosed how long he had lived in Massachusetts, nor is it necessary to go into an inquiry upon that subject. Under the circumstances stated, we must read his will as the will of a person settled and established in Massachusetts. In speaking of heirs at law, he probably meant those who would be heirs at law here. It is true, that in point of fact no land in Massachusetts was included in the residuary devise; but the devise was broad enough in its terms to include such land, if by purchase or otherwise the testator had afterwards become possessed of any. The ascertainment of the persons who were to take under the description of the heirs at law of Judith Perry did not depend upon the circumstance of where land of the testator embraced within the residuary clause might be situated. The will makes no mention of the residence of Benjamin F. Perry, or of Judith Perry, nor of the situation of the land which the testator had in mind as likely to pass by the residuary devise. In four different instances, the testator gives a remainder after a life estate to heirs at law; in one instance, to his own heirs at law. In the last instance, at least, since a will is held to speak from the time of the testator's death, he must be supposed to have meant those persons who would be his heirs at law according to the laws of Massachusetts. Ascertain the persons, and it would be the same as if they had been named in the will. And, while it must be admitted that this solution of the question is not free from doubt, we think the heirs of Judith Perry must be ascertained in the same way. *Merrill v. Preston*, 135 Mass. 451, 456. *Sewall v. Wilmer*, 132 Mass. 131, 136.

3. Under the decision in *Lavery v. Egan*, 143 Mass. 389, the husband of Judith Perry must be considered as her heir, to an amount not exceeding five thousand dollars in value. The statute giving to him this right was passed after the death of the testator. St. 1880, c. 211, § 1. But the testator, in providing that at the decease of Judith Perry the portion of the residue which she had held for her life should go to her heirs at law, must be held to have meant her heirs at law as ascertained by

the laws in force at her decease. Until then, it could not be determined who her heirs would be.

4. Testimony to show that the testator did not wish to have Judith's husband receive anything under the devise to her heirs at law was incompetent. *Tucker v. Seaman's Aid Society*, 7 Met. 188. *Osborne v. Varney*, 7 Met. 301. *American Bible Society v. Pratt*, 9 Allen, 109. At the time the will was drawn, he would not have been included under that designation. His right arises from the subsequent change in the statutes; and the testator must be held to have been content to take this chance, since he did not in terms provide against it. *Ordered accordingly.*

FREDERICK W. G. MAY vs. SARAH E. SKINNER & another.

Middlesex. March 26, 27, 1889. — June 19, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Probate Appeal — Guardian and Ward — Executor — Allowance for Services.

If a decree of the Probate Court, upon a guardian's petition on the Pub. Sts. c. 139, § 38, for leave to expend money to build a stable for his ward, grants such leave, and sets a limit to such expenditure, which the guardian exceeds, such limit merely defines the authority conferred, and the guardian is not precluded from justifying his action by proof that the excess of expenditure was proper.

A charge by such guardian in his account, for superintending the building of the stable, was held to be rightly disallowed.

An executor in his account made a charge of one per cent for transferring personal property to a special administrator, pending a controversy over the probate of the will, and an additional charge for computing what was due under a special legacy of bonds to a legatee. Held, that one half of one per cent should be allowed for such transfer, and that the charge for the computation was rightly disallowed.

THREE APPEALS by Frederick W. G. May, guardian and executor of the will of Frederick May, an insane person, from decrees of the Probate Court disallowing certain items of his accounts. The appellees, Sarah E. Skinner and Kate L. White, were legatees under the will. The cases were separately referred to the same master, whose several reports, so far as material, were as follows.

The items disallowed were \$8,381.86, the excess above a limited amount allowed by the Probate Court for the building of a stable for the ward; \$500 for services of the guardian in superintending the building of such stable; \$94.67, being one half of a commission of one per cent charged by him for transferring certain personal property of the ward to a special administrator appointed pending a controversy over the probate of the will; and \$150 for computing the amount of a specific legacy due Sarah E. Skinner under the will.

The appellant, as guardian, filed a petition in the Probate Court for leave to build a stable for his ward on a lot in Medford, which had been bought for his homestead, and on which a convenient and valuable house had been built for him, which he occupied until his death.

The petition alleged "that his ward is desirous of having built on his estate at Medford, where he resides, a stable of greater capacity and more in keeping with the house and surroundings of the place than the one now there, which is small and of an inferior character; that much of said ward's enjoyment is derived from his horses, their comfortable keeping, and the careful housing of his vehicles and stable furniture"; and prayed for authority "to build on said estate a stable suited to the tastes, wishes, fortune, and station of his ward, and for that purpose to sell and transfer so much of the stocks and personal property of his estate as should be necessary." On this petition the judge of probate entered a decree "that the prayer of said petition be granted, and said guardian is hereby authorized to erect a stable on said estate at an expense not exceeding ten thousand dollars, and to sell and transfer personal estate of his ward to defray the expenses of building such stable." From this decree an appeal was taken to this court, which affirmed the decree upon the grounds stated in the report of the case, *May v. May*, 109 Mass. 252.

The guardian began to build the stable soon after the decree was affirmed, having procured plans for the same with which the ward was much pleased, and according to which a room was to be included in the stable for a man. When the work of building the stable was commenced, it was soon found that it was reasonable and convenient in the development of the work

to make some changes in the proposed structure and the inside arrangement thereof from those which were first proposed or suggested, and to enlarge the area which the building was to cover by constructing under the same roof, and as part of the stable, a small tenement sufficient for the occupancy of a man to care for it and his family, so that the ward might not be required to have them in his own dwelling-house, and this was done. When finished, the whole stable, which was built by the day, including the internal conveniences and tenement in the same, cost \$18,381.36. The master took a view of the ward's house, the stable, and the lot of land upon which they were built. The guardian was the only witness examined before the master, and testified that he had paid the sums charged in his accounts for building the stable, and that in his opinion the sums paid were reasonable. There was no other evidence adduced by either party in regard to the reasonableness of the expenditure.

The master found that the changes made in the stable and the time and manner of constructing it were reasonable, and were approved of by the ward, who took great interest in the enjoyment of his stable, horses, and carriages, and that the stable was built in accordance with his tastes and wishes; that it was important to the health and comfort of the ward that there should be no further delay in building the stable, and that the delay from the time of filing the original petition until the final decree had vexed and worried him, and that it was reasonable and proper for the guardian to build at once; that the stable was built with reasonable expense and cost, and that it was reasonable and useful to the ward to expend a larger and reasonable sum in addition to the limited sum of ten thousand dollars, and that the whole amount spent in building the stable, including such increase, considering the means, conditions, wants, wishes, and tastes of the ward, was reasonable and useful to the ward, and was expended in a suitable, proper, and reasonable manner. The stable when completed was used and enjoyed by him to the time of his death, on September 13, 1875, a considerable time after the stable was built. The master submitted to the court whether the appellant should be allowed the \$8,381.36, or any part thereof, money expended by him in erecting the stable over and above the said sum of ten thousand dollars.

The appellant as guardian charged \$750 for superintending the construction of the stable, and of this charge the Probate Court disallowed \$500, which amount the master also disallowed. The stable was constructed only under the superintendence of the appellant, who visited the stable two or three times a week during its construction, which occupied nearly a year, and gave proper superintendence of the work. The guardian was not an architect or builder, and there was no evidence that he had had any previous experience in building, except that he testified that he had once had a stable built himself, and that he had had extensive alterations made in the ward's house in Medford. He was in the habit of visiting the ward and dining with him at his house about three times a week, and it was on these occasions that he made his visits to the stable. The guardian charged the sum of one hundred dollars per month, including the whole of September, 1875, for personal services, care, and attendance upon the ward, which was allowed him, as well as a commission of five per cent on income received by him. The master submitted to the court whether the guardian should be allowed his whole claim for his services in superintendence of the building of the stable, and if not, what portion, if any, thereof should be allowed him.

The appellant as executor charged the sum of \$189.35, being a commission of one per cent on the amount of personal property transferred to a special administrator who was appointed on account of a controversy concerning the probate of the ward's will, which was finally proved, and letters testamentary granted to the appellant as the executor thereof, in 1879. The judge of probate allowed the sum of \$94.68, being one half of one per cent, and disallowed \$94.67, which the master also disallowed, and submitted the question to the court whether one per cent or one half of one per cent should be allowed him as his commission.

The appellant as executor charged one hundred and fifty dollars for time and labor in computing the amount due Miss Skinner under the thirty-third clause of the will of the testator, the material part of which was as follows: "I give and bequeath to the said Sarah Elizabeth Skinner . . . my gold-bearing registered United States bonds, with the proceeds of their interest, now in my tin trunk, amounting now to about \$2,000,

and whatever the same may amount to by accumulation of interest, and into whatever securities the same may be at the time of my decease."

The master found that the service was actually rendered, and that the computation was a difficult one; that at the time when the will was made, on July 14, 1870, the testator had two thousand dollars in United States gold-bearing six per cent bonds, the income of which was regularly paid to him in gold, which, with other money which came to him, he subsequently invested; that between the date of the will and that of his death some of the bonds were redeemed by the United States, and the proceeds thereof were deposited with a trust company on interest payable semiannually; that at the time of his death he had forty-five hundred dollars in United States bonds; that the necessary computation extended over a period of about ten years; and that the appellant for his services as executor made a general charge of five per cent on income, and of two and a half per cent on capital, amounting together, in both accounts, to \$5,097.85, which, with some charges for special services, was allowed. The master disallowed the charge in question, because he did not think that the service of computation was such a special service as to be a subject of special compensation, and submitted to the court the question whether, upon these facts, the charge of one hundred and fifty dollars, or any part thereof, ought to be allowed.

Hearing upon the master's reports, and exceptions of both parties thereto, before *W. Allen, J.*, who ordered that the three appeals be consolidated under the St. of 1888, c. 290, § 5, and reserved the case for the consideration of the full court.

Samuel Hoar, for the appellant.

J. L. Thorndike, for the appellees.

HOLMES, J. These are appeals from decrees of the Probate Court upon accounts of the appellant as guardian and executor of an insane person. The guardian was authorized by the Probate Court, and by this court on appeal, to build a stable for his ward at an expense not exceeding ten thousand dollars. *May v. May*, 109 Mass. 252. The stable was built, and cost \$18,381.36. The main question is, whether the guardian should be allowed \$8,381.36, the excess over the limit set in the decree.

The master reports, that, when the work of building was begun, it was found convenient to make some changes in the proposed structure; that the changes made were reasonable, and were approved by the ward; that it was important for the health of the ward to build at once, that is, as we understand it, without the delay of a further application to the court; that the stable was built at a reasonable cost; and that the additional expenditure was reasonable and useful to the ward. The master took a view of the premises, and heard the testimony of the guardian. We cannot say that his findings were not warranted by the evidence; and upon those findings, but for the decree, there can be no doubt that the guardian would be allowed the whole amount expended. *Kendall v. May*, 10 Allen, 59. *May v. May*, 109 Mass. 252. *Killpatrick's appeal*, 118 Penn. St. 46.

We are of opinion that the limit of ten thousand dollars set in the decree did not import a prohibition to exceed it, but only marked the extent of the authority conferred. The proceeding was a proceeding to obtain authority to sell personal estate and invest it in the stable, under the Gen. Sts. c. 109, § 22 (Pub. Sts. c. 139, § 38). The decree was a grant of authority, in pursuance of the prayer of the petition. If the guardian went beyond the authority granted, he did so at his peril, and was bound to justify his expenditure or to make it good. But it seems to us that it would be needlessly harsh to say that the decree excluded him from proving a justification which otherwise would have been open to him.

We see no sufficient reason for differing from the conclusion of both the probate judge and the master, that five hundred dollars of the charge made by the guardian for superintendence should be disallowed; that only one half of one per cent on the amount transferred to the special administrator should be allowed, and that no additional compensation should be given for computing what was due under a specific legacy of bonds to Miss Skinner. *Urann v. Coates*, 117 Mass. 41, 44. *Dixon v. Homer*, 2 Met. 420, 423. *Turnbull v. Pomeroy*, 140 Mass. 117, 118.

Decree accordingly.

NEW ENGLAND DREDGING COMPANY vs. ROCKPORT
GRANITE COMPANY & another.

Suffolk. March 28, 1889. — June 19, 1889. .

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Contract under Seal — "Ratification" — Partnership — Surplusage
— Undisclosed Principal.*

Contracts under seal between two, for the doing of certain work by one to be paid for by the other, were held not to be enforceable after the work was done as against others not parties to the instruments, either as parties by a ratification on their behalf, or as partners in the enterprise.

BILL IN EQUITY, filed July 8, by the plaintiff, to charge the Rockport Granite Company and the Cape Ann Granite Company, as partners with or equitable sureties of Clapp and Ballou, upon contracts under seal between the two last and the plaintiff.

The defendants demurred to the bill, on the ground that the plaintiff had a plain, complete, and adequate remedy at law, for want of equity, because of laches, for misjoinder of parties defendant, and for multifariousness.

W. Allen, J., sustained the demurrer, and reserved the case for the consideration of the full court. The material facts appear in the opinion.

J. C. Coombs & E. P. Payson, for the plaintiff.

J. O. Teele, for the defendants.

HOLMES, J. This case comes before us upon demurrer to a bill brought to charge the defendants upon two instruments under seal, called contracts B and E, by which the plaintiff covenanted to do certain dredging and filling, which it has done, and the other parties to the instruments agreed to pay for the work, which agreement has been but partially fulfilled. Contract B was a subcontract for part of the work called for by a contract under seal, made by the Rockport Granite Company and Clapp and Ballou with the Commonwealth, on September 29, 1873, to build sea walls and to do some filling upon South Boston flats. This is called contract A. Contract E bears a similar relation to a simple contract called D, made by Clapp

and Ballou with the Boston and Albany Railroad Company, on September 21, 1874, to do similar work to that under A, upon adjoining territory.

On February 7, 1874, the Cape Ann Granite Company agreed under seal, by a contract called C, with the Rockport Granite Company and Clapp and Ballou, that it should have one third interest in the contract A with the Commonwealth, and in the contract B with the plaintiff, and "as between the parties" to C should have the same rights and liabilities as if it had joined in A and B. We will take it that both the defendant companies had an interest also in D and E when made. On October 24, 1874, these companies sold out their interest to Clapp and Ballou, and took a bond of indemnity. The plaintiff did not know of the interest of the Cape Ann Granite Company until after the latter had sold out. It is alleged that the effect of the several contracts mentioned, which are all set forth, was that the defendants were "partners or quasi partners of Clapp & Ballou, and are now subject to the liabilities accordingly upon contracts B and E herein sought to be enforced."

The first of the contracts sued upon, B, purports to be made between "the Rockport Granite Company, . . . George Clapp and Frederick K. Ballou, both of Boston, . . . partners under the firm and style of Clapp & Ballou," parties of the first part, and the plaintiff. This contract was made on September 29, 1873, before the Cape Ann Granite Company had acquired any interest in the subject matter, and, apart from the more general difficulty arising from its being under seal, to which we shall advert in dealing with E, there is no ground of either form or substance for the suggestion that the Cape Ann Granite Company was a party to it. Clearly it was not a party to it when made, and if when made the contract was not made on behalf of the Cape Ann Company, like the contracts in *Cady v. Shepherd*, 11 Pick. 400, *Holbrook v. Chamberlain*, 116 Mass. 155, *Ahrend v. Odiorne*, 125 Mass. 50, &c., that company could not become a party to it by ratification. The meaning of ratification is, and always has been, the adoption of an act purporting to be done, or, at least, done in fact, on behalf of the ratifier. Y. B. 30 Ed. I. 128; 7 Hen. IV. 34, 35, pl. 1. Godbolt, 109, pl. 129. *Wilson v. Tummam*, 6 Man. & G. 236. In order to bind

the Cape Ann Company a new and substituted contract would be necessary, and no such contract is alleged.

Some reliance was placed on contract C, by which the Cape Ann Company afterwards became interested in B and A. But the undertaking there is expressly limited to liability as between the parties to the instrument, and does not purport to be for the benefit of the plaintiff. Such a contract confers no rights upon strangers who may happen to benefit by its performance. *Montague v. Smith*, 13 Mass. 896, 405. *Exchange Bank v. Rice*, 107 Mass. 37. *Prentice v. Brimhall*, 123 Mass. 291. *Flynn v. North American Ins. Co.* 115 Mass. 449. No doubt the covenantee, either within the instrument or without it, may declare a trust in favor of a third person. *Bailey v. New England Ins. Co.* 114 Mass. 177. *Lloyd's v. Harper*, 16 Ch. D. 290. But there is nothing of that sort here. See *National Bank v. Grand Lodge*, 98 U. S. 123.

The second of the contracts sued upon, E, was made on September 21, 1874. It purports to be made "between George Clapp and Frederick K. Ballou, both of Boston, in the county of Suffolk and Commonwealth of Massachusetts, party of the first part, and the New England Dredging Company." Like B, it is under seal. Therefore no one can be sued upon it as a covenant, except a party to the instrument. *Huntington v. Knox*, 7 Cush. 871, 874. *M'Ardle v. Irish Iodine & Marine Salts Manuf. Co.* 15 Ir. C. L. 146, 153. *Ward v. Motter*, 2 Rob. (Va.) 536, 562. *Childs v. Shoemaker*, 1 Wash. C. C. 494, 496.

It was suggested that we might read Clapp and Ballou as a partnership name embracing the defendants, assuming that a partnership is disclosed by the bill. But if it would be permissible to show that a single name, seemingly that of an individual, was in truth also a partnership name, and that it was used as such in a deed, (*Butterfield v. Hemsley*, 12 Gray, 226,) in this case there are two names used, not in conjunction, but separately and at length. The contract purports to describe two men and no more, as plainly as if it had said so in terms. There is no pretence that the defendants did business under the name of Clapp and Ballou in any form or on any occasion, unless on this one, and the document excludes their having done so here. When that is the case, the contract cannot be contra-

dicted. See *Finney v. Bedford Ins. Co.* 8 Met. 348; *Humble v. Hunter*, 12 Q. B. 310; *Schmaliz v. Avery*, 16 Q. B. 655, 660; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201.

For the same reason, the contract could not have become binding on the defendants by ratification, because an instrument under seal cannot be ratified except by those whom it purports to bind.

It was not argued that the seal could be treated as surplusage. The bill attempts to enforce the contracts as instruments under seal. Assuming that, if it clearly appeared from the face of the document that the contract was intended to bind one who by the technical rules applied to sealed instruments was not bound, the seal, if unnecessary, might be disregarded in some cases, (*Cook v. Gray*, 133 Mass. 106, 111,) still, when the instrument discloses no such intent, is complete on its face, and is framed throughout as a deed only intended to bind those whom it purports to bind, it would overthrow the distinction between specialty and parol if the seal could be rejected in order to charge an undisclosed principal upon any fact alleged in this bill. *Briggs v. Partridge*, 64 N. Y. 357. *Moore v. Granby Mining & Smelting Co.* 80 Mo. 86. See *Dillon v. Brown*, 11 Gray, 179. *Russell v. Annable*, 109 Mass. 72.

The fact, if it was one, that the defendants were or became equitably interested in the contract, did not make them liable, because it did not make them parties to it. The contract remained a common law contract, and nothing more. The defendants got no rights in their own persons against the plaintiff, but simply the right to compel Clapp and Ballou to exercise their rights for the defendants' benefit. Even if, as matter of procedure, the defendants were allowed to sue in their own name, they would only be exercising the right of Clapp and Ballou. For the same reason the defendants were not bound to the plaintiff. See *Walters v. Northern Coal Mining Co.* 5 DeG., M. & G. 629, 640 *et seq.*; *Cox v. Bishop*, 8 DeG., M. & G. 815; Master of the Rolls in *Clavering v. Westley*, 3 P. Wms. 402; *Borcherling v. Katz*, 10 Stew. 150.

We have dealt with as much of the plaintiff's argument as we deem necessary in order to dispose of the case. We shall not discuss other questions which would have to be considered before the bill could be sustained. *Demurrer sustained.*

TIMOTHY G. WRIGHT & another vs. HORACE A. LOTHROP.
TIMOTHY G. WRIGHT vs. SAME.

Suffolk. January 9, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

*Breach of Contract — Legislative Committee — Witness — Slander —
Privileged Communication.*

The owner of a building, after its burning and pending an action by him against a tenant at will to recover therefor in which an averment of wilful burning was negatived by a jury, who found the tenant negligent only, agreed to settle with the tenant upon his agreeing to prosecute the collection of his insurance money, and to pay over a portion of it to the owner, who agreed on his part not to "obstruct the collection of said claims." Thereafter the owner voluntarily appeared before a committee of the Legislature, to which an order, introduced at his suggestion, making tenants at will liable for damages from fire caused by their carelessness, had been referred, and stated that his tenant had wilfully burned his building, or that he thought he had, though he could not prove it; whereupon the tenant, because of such statement, settled with the insurance companies, which knew of the owner's original charge but did not appear to have heard of the latter statement, for less than the amount claimed. *Held*, that the owner's statement before the committee was not such an obstruction of the collection of the claim as to constitute a breach of the agreement.

Whether the statement before such committee was a privileged communication, as made by the owner in good faith and without malice, was *held* to be a question for the jury.

TWO ACTIONS, the first an action of contract for the breach of a written agreement, and the second an action of tort for slander. The cases were tried together in the Superior Court, before *Mason, J.*, who ruled that the actions upon the facts in evidence could not be maintained, and directed a verdict in each case for the defendant; and the plaintiffs alleged exceptions. The material facts appear in the opinion.

R. M. Morse, Jr., for the plaintiffs.

A. Churchill & G. O. Shattuck, (*J. R. Churchill* with them,) for the defendant.

FIELD, J. The first of these actions is an action of contract on a written agreement under seal entered into by Wright and Thayer, the plaintiffs, party of the first part, and by Lothrop, the defendant, party of the second part. This agreement recites

that Lothrop had brought an action against Wright and Thayer to recover the value of a building and of certain personal property "alleged to have been burned through the wilful and negligent acts of the defendants" in that suit; that the jury had found a verdict for Lothrop, on the ground that the property had been burned "by the negligence, but not by the wilful acts, of said Wright and Thayer"; that this court had ordered a new trial of the action; that Lothrop had also brought another action against Wright and Thayer for rent of said building, and for other causes; that both of these actions were pending; and that the parties had agreed to settle all their claims and causes of action between themselves. Therefore, it is agreed "that in both of said actions judgment shall be entered for the defendants without costs"; that Wright and Thayer shall jointly and severally prosecute their suits on certain policies of insurance which they had upon the property destroyed, and shall not compromise these suits or discharge their claims upon the insurance companies without the approval of Lothrop or of his attorney, Mr. Churchill; that they shall pay out of the proceeds of said suits to Lothrop thirty-five hundred dollars, and in addition thereto one fourth part of all that may be recovered in said suits beyond the sum of fourteen thousand dollars, and the counsel fees in the suits; that for the purpose of securing to Lothrop the payment of these amounts Wright and Thayer hereby assign to Churchill, as trustee, their claims against the insurance companies; and that the parties mutually release each other from all claims and causes of action except such as may arise from the agreement.

The fourth paragraph of the agreement is as follows: "That said Lothrop will do nothing to obstruct the collection of said claims of said Wright and Thayer against said insurance companies, and will aid said Wright and Thayer in the same by giving them all the information, evidence, and suggestions in his power or possession which they may deem useful and may request him to give; and that said Lothrop will further, in the same manner, aid said Wright and Thayer at their request in the compromise of said claims so far as he may be able so to do." No evidence appears in the exceptions that Lothrop was ever requested by Wright and Thayer to give any information, or

to aid them in any manner, and Wright testified "that Lothrop was never called on to help or in any way render assistance under the contract." There was, therefore, no evidence of any breach of the last clauses of this paragraph. The plaintiff contends that there was evidence that Lothrop had broken his covenant to "do nothing to obstruct the collection of said claims."

It appeared that an order had been introduced, at the suggestion of Lothrop, in the House of Representatives of the Commonwealth, "that the Committee on Insurance consider the expediency of such legislation as will make 'tenants at will' liable for damages from fire caused by their carelessness"; that this order had been ultimately referred to the Committee on the Judiciary; and that after the order was referred to this committee, Lothrop appeared before the committee and called its attention to the report of the case of *Lothrop v. Thayer*, in 138 Mass. 466, which had then been published, and was the report of the decision by this court of the action he had brought against Thayer and Wright for the burning of his property. Lothrop desired the committee to report a bill making tenants at will liable for the negligent burning of property in their possession, and, while advocating this before the committee, he explained the action which he had brought and the decision of the court, and said to different members of the committee that the tenants, meaning the plaintiffs, had wilfully burned his building, or that he thought they had, although he could not prove it. There is some evidence that he said this without having been specifically asked a question upon this subject by the committee, and that the committee room was open to the public at the time. There was also evidence that Wright and Thayer, on hearing that Lothrop had made this statement before the committee, authorized a settlement of the insurance cases for twelve thousand dollars, which was the amount insured by the policies, excluding interest, which then amounted to between four and five thousand dollars. This settlement was made with the approval of Mr. Churchill. It is not denied that the insurance companies knew that Lothrop in his action originally charged Wright and Thayer with wilfully burning his property; that this had been one of the issues in the trial of the cause; and that evidence had been introduced to support it. Indeed,

Wright testified "that the insurance companies knew the charge had been publicly made at said trial," and "that the insurance companies knew all that had been testified to at the trial." The plaintiffs complain that the statement of Lothrop before the committee revived an old slander, and they say that, fearing the effects of it, they made a settlement for a less sum than otherwise they would have obtained.

The question is whether making this statement before the committee was, under the circumstances, a breach by Lothrop of his covenant to "do nothing to obstruct the collection of said claims." It certainly was not a direct interference with the prosecution of the suits, or with the negotiations between the parties to the suits. There is no evidence that Lothrop in making this statement, or in advocating the proposed legislation, had any intention of obstructing the collection of the claims, unless this can be inferred from the facts which have been recited, and knowing as he did that the insurance companies knew that he had brought an action against Wright and Thayer in which he charged them with intentionally burning his property, and that he had at the trial introduced evidence to sustain this charge, we think that he could not have reasonably anticipated that his statement before the committee would have the effect of obstructing the collection of the claims. He had an interest in not obstructing the collection of the claims, and the only reasonable inference is, that Lothrop appeared before the committee for another purpose than that of obstructing the collection of the claims.

There is no evidence that the statement of Lothrop before the committee had actually the effect of obstructing the collection of the claims. We doubt even if the evidence recited in the exceptions would have warranted the jury in finding that the insurance companies knew of the statement made before the committee. There was evidence that the statement was "put in the papers," but in what papers does not appear, and it does not appear that the insurance companies or their agents were subscribers to these papers, or that they saw them, or that the papers circulated in the places where the insurance companies or their agents did business. The covenant is undoubtedly somewhat indefinite in meaning, but we think it would be an

unwarrantable construction of it to extend it to statements made to persons who were strangers to the suits, which could not reasonably be expected to have the effect of obstructing the collection of the claims, and which were not shown to have had any influence upon the insurance companies.

In the first case the court rightly ordered a verdict for the defendants, and the exceptions must be overruled.

The second of these actions is an action of tort, brought by Wright against Lothrop, for slander, in making the statement concerning the burning of his property which has been recited. The answer sets up, among other things, that the statement was a privileged communication made to a committee of the Legislature upon a subject then under consideration by the committee, and concerning which the committee had a duty to perform, and that the statement was made without malice and under the belief that it was true, and that this was a reasonable belief. The privilege of a witness appearing before a committee of the Legislature, in a matter within the jurisdiction of the committee, is undoubtedly the same as that of a witness in proceedings before a court of justice.

The examination of witnesses is regulated by the tribunal before which they testify, and if witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked them by the tribunal, they ought to be absolutely protected. It is not the duty of a witness to decide for himself whether the questions asked him under the direction of the tribunal are relevant. As the witness is sworn to tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry, or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry, and which he does not believe to be relevant. This statement of the law, we think, is supported by the decisions in this Commonwealth. The English decisions, perhaps, go somewhat further than this in favor of a witness; certainly they apply the rule liberally for his protection. *Marsh v. Ellsworth*, 50 N. Y. 309. *White v. Carroll*, 42 N. Y. 161.

Calkins v. Sumner, 13 Wis. 193. *McLaughlin v. Cowley*, 127 Mass. 316. *Gott v. Pulsifer*, 122 Mass. 235. *Rice v. Coolidge*, 121 Mass. 393. *Atwill v. Mackintosh*, 120 Mass. 177. *Brow v. Hathaway*, 13 Allen, 239. *Kidder v. Parkhurst*, 3 Allen, 393. *Gassett v. Gilbert*, 6 Gray, 94. *York v. Pease*, 2 Gray, 282. *Hoar v. Wood*, 3 Met. 193. *Bradley v. Heath*, 12 Pick. 163, 165. *Seaman v. Netherclift*, 2 C. P. D. 53. *Munster v. Lamb*, 11 Q. B. D. 588. *Goffin v. Donnelly*, 6 Q. B. D. 307. *Dawkins v. Rokeby*, L. R. 7 H. L. 744. *Odgers, Libel and Slander*, 191. *Townshend, Slander and Libel*, § 223.

If, then, the statement of Lothrop to the committee be regarded as the pertinent answer of a witness to questions put to him by members of the committee, the action cannot be maintained. Lothrop may have been treated as a witness by the committee, although he was not sworn. There was some evidence, however, as we construe the exceptions, that the defendant was not a witness, and was not so considered or treated by the committee, but that he appeared before the committee voluntarily to call attention to the state of the law on the subject of the liability of tenants at will for the negligent burning of buildings in their possession, and to urge the committee to report a bill changing the law, and that he made the statement without being asked a question upon the subject.

The defendant had the interest which all citizens have in procuring wise legislation, and his attention had been particularly called to what he may have deemed a defect in the law. In asking Mr. Boyden, a member of the House of Representatives, to introduce the order, and in appearing before the committee to which the order had been referred, it must be considered that he was acting in a matter which legitimately concerned him, and was making communications to persons who had authority to deal with the subject, and that such communications are privileged if they are made in good faith and without malice. The privilege is conditional, not absolute. If the defendant stated before the committee that the plaintiff wilfully burned his building, and this statement was not made in answer to any question put to him by the committee while having under consideration the order referred to them, we think it was a question for the jury whether the defendant was acting in good faith

and without malice, and, as pertinent to this question, it is to be considered whether the statement in the circumstances under which it was made was properly relevant to the inquiry and discussion before the committee. *Gott v. Pulsifer*, 122 Mass. 235. *Atwill v. Mackintosh*, 120 Mass. 177. *Gassett v. Gilbert*, 6 Gray, 94.

In the second case the exceptions must be sustained.

Ordered accordingly.

JEROME F. MANNING vs. ASA FRENCH & others.

Middlesex. January 9, 10, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

*Attorney and Counsellor — Disbarment — Court of Commissioners of
Alabama Claims — Judges.*

The Court of Commissioners of Alabama Claims, under the acts of Congress creating it and extending its existence, had the power to make rules defining the qualifications of attorneys to be admitted to practise before it, and to prohibit, after due notice and hearing, an attorney duly admitted from further practising before it; and the judges of such court did not become thereby individually liable to an attorney disbarred by them.

The judges of the Court of Commissioners of Alabama Claims continued, by virtue of their original appointment, to be judges of that court during its entire existence.

TORT to recover damages from the judges of the Court of Commissioners of Alabama Claims for prohibiting the plaintiff from practising as an attorney in that court. The defendant French, upon whom only service was made, alone defended. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows.

The following facts appeared in evidence. The Court of Commissioners of Alabama Claims was established by the act of Congress of June 23, 1874, c. 459, re-established by the act of June 5, 1882, c. 195, and continued by the act of June 3, 1884, c. 62. The defendant French was commissioned and qualified as a judge on or about July 5, 1882; the defendant Harlan was

also commissioned at or about July 5, 1882, and the defendant Draper not until 1885. The court in 1874 adopted, among other rules, the following: "Rule V. Any person of good moral character admitted to practise as attorney or counsel in the Supreme Court of any State, or Territory, or the District of Columbia, or in any of the federal courts, on filing with the clerk a written statement of the date and place of such admission, with his name and post-office address in full, may, on motion, be admitted to practise in this court"; and in 1882, among additional rules, the following: "Rule XIV. All attorneys admitted to practise in the Court of Commissioners of Alabama Claims, as created under the law of Congress approved June 23, A. D. 1874, will be recognized as attorneys in this court, re-established under the law of Congress, approved June 5, 1882."

The plaintiff, who was an attorney and counsellor at law, duly admitted to practise in the Supreme Court of the United States, in the Court of Claims of the United States, and in all the courts of this Commonwealth, was in 1875, on motion, admitted to practise as an attorney and counsellor before the Court of Commissioners of Alabama Claims, and prosecuted before that court many of such claims, and became entitled to receive from the claimants many thousands of dollars.

A copy of the "record of proceedings In re Jerome F. Manning," in the Court of Commissioners, duly attested, was put in evidence, and recited among other things the following.

On July 24, 1885, the court, consisting of the Hon. James Harlan, Presiding Judge, and the Hon. Asa French and the Hon. A. S. Draper, Associate Judges, passed the following order:

"Ordered, That because of flagrant unprofessional conduct on the part of Jerome F. Manning, an enrolled attorney and counsellor at law on the records of this court, he, being uninvited and refused admittance to its consultation room, July 23, 1885, then occupied by the court sitting in chambers engaged in the transaction of its official duties, nevertheless forced his way into said room, and interrupted the court in the prosecution of its official work by unseemly threats, then and there uttered against one of the judges thereof because of an official opinion delivered from the bench in open court by said judge as the organ of the court in the announcement of a decision in a

case pending before it; therefore, for the purpose of preventing the occurrence of like attempted intimidations in future on the part of said Manning, and preserving the freedom of the court in the discharge of its judicial duties, the said Jerome F. Manning is hereby commanded to appear before this court, Saturday, July 25, 1885, at ten o'clock A. M., and show cause, if any there be, why his name shall not be stricken from the rolls of attorneys and counsellors at law authorized to practise before this court. The clerk of this court is hereby directed to give notice hereof to the said Manning, by causing an attested copy of this order to be served personally on him forthwith."

On July 25, 1885, after the clerk, by direction of the court, had read the above order in open court, Manning made a statement, disclaiming any intention of interrupting or insulting the court, and asked for a postponement of the hearing until July 27, 1885; but the court consented to postpone the hearing only until four o'clock P. M. of the same day, at which hour Manning appeared with counsel, who filed and read affidavits and addressed the court in defence of Manning; and the court thereupon held the matter for advisement.

The court, on July 29, 1885, after a statement signed by all three of the judges, which set forth in detail the conduct of the plaintiff as outlined in the above order of July 24, and the circumstances attending his interruption of the court while in consultation, together with the reasons guiding the court in its action, made the following decree: "Ordered, that for the reasons set forth in the rule to show cause, and in the statement accompanying this decree and made a part thereof, the said Jerome F. Manning be, and he hereby is, prohibited from appearing and acting in this court in relation to any matter or business therein pending, and from exercising in any way the functions of an attorney and counsellor of this court. This decree to stand until further order of the court."

On the same day the court also made the following order: "Ordered, that the clerk of the court is hereby authorized to substitute the name of any attorney of this court in place of said Jerome F. Manning in any case, upon the receipt of the request in writing from the claimant therein, or from his legal representatives, to that effect."

Subsequently, on October 15, 1885, the court declined to entertain a motion made on behalf of Manning to rescind the order of disbarment of July 29, 1885, and stated the conditions under which only it would grant such a motion.

The defendant French admitted that he concurred with the other members of the court in issuing and enforcing the orders of July 24 and 29, and that the plaintiff was thereby damaged, and contended that the Court of Commissioners of Alabama Claims had authority to issue and enforce the same, and that any loss sustained by the plaintiff thereby was *damnum absque injuria*.

The plaintiff introduced evidence tending to show that each of the allegations in his declaration was true; contended that Rules V. and XIV. were unauthorized and of no effect, and that the said Court of Commissioners had no power to create a bar, or to admit attorneys thereto, or to expel them therefrom; and asked the judge to make the following rulings:

"1. That the Court of Commissioners of Alabama Claims had no authority to make the order made by them touching the plaintiff, on July 29, 1885, and that the same was unlawful.

"2. That the defendant French, having admitted that he concurred with the other defendants in issuing and enforcing said order of July 29, 1885, and that the plaintiff was thereby injured, the plaintiff is entitled to recover from said French compensation for all losses sustained by him as the direct result of said order of July 29, 1885, and of the enforcement thereof from thence to December 31, 1885.

"3. That more than two years having elapsed after the reorganization of the Court of Commissioners of Alabama Claims, under the act of June 5, 1882, and after the appointment of the defendant French and the other defendants, but prior to July 24, 1885, the said French and the other defendants had, on said last mentioned day and thereafter, no lawful authority to act as judges of said Court of Commissioners of Alabama Claims."

The judge declined so to rule, found the facts to be as stated in the copy of the record of the court, and ruled that the action could not be maintained; and found for the defendant. The plaintiff alleged exceptions.

C. Cowley, for the plaintiff.

C. T. Russell, Jr., for the defendant French.

FIELD, J. The act of Congress approved June 5, 1882, (22 U. S. Sts. at Large, 98,) provided in § 1, "that the Court of Commissioners of Alabama Claims, created by chapter four hundred and fifty-nine of the laws of the Forty-third Congress, is hereby re-established, in the manner and with the obligations, duties, and powers imposed and conferred by said chapter, except as changed or modified by this act"; in § 2, "that the number of judges for said court, to be nominated and appointed in the mode directed by section two of said chapter, shall be three, each to receive the compensation provided by section four of said chapter"; in § 3, "that the judges of the court hereby re-established shall convene and organize, in the city of Washington, as soon as practicable after their appointment, and the court so organized shall exist two years"; and in § 4, "that the practice and proceedings established and directed by said chapter four hundred and fifty-nine shall be followed and had in regard to all claims provable under this act," etc.

The act of June 23, 1874, which is the act referred to as chapter 459 of the laws of the Forty-third Congress, provided in § 1 for the appointment by the President, by and with the advice of the Senate, of five suitable persons, "who shall constitute a court, to be known as the 'Court of Commissioners of Alabama Claims,'" each of whom "shall take the oath of office prescribed by law to be taken by all officers of the United States"; and in § 2, that "said judges shall meet and organize said court in the city of Washington, where the said court shall hold its sittings." Section 3 provided "that the said court be, and it is hereby, authorized to publish notice of its sessions, and to make all needful rules and regulations not contravening the laws of the United States or the provisions of this act, for regulating the forms and modes of procedure before the said court, and for carrying into full and complete effect the provisions of this act. Such rules and mode of procedure shall conform, as far as practicable, to the mode of procedure and practice of the Circuit Courts of the United States; and the said court is hereby vested with the same powers now possessed by the Circuit and District Courts of the United States

to compel the attendance and testimony of parties, claimants, and witnesses, to preserve order, and to punish for contempts," etc. The statute also provided for the appointment of a clerk and a short-hand reporter, and the designation of a counsellor at law to act as counsel for the United States. By section 8 of this act the court was to continue to exist "for one year from the date of its first convening and organizing," and if it was found impracticable for the court to complete its work within the year, the President was authorized by proclamation to extend the existence of the court for a further period not exceeding six months. The existence of this court was extended by proclamation of the President and by subsequent acts of Congress until January 1, 1887, when it expired by limitation of time. Proclamation of June 2, 1875, 19 U. S. Sts. at Large, 661. U. S. St. of Dec. 24, 1875, 19 U. S. Sts. at Large, 1. U. S. St. of March 6, 1876, 19 U. S. Sts. at Large, 6. U. S. St. of July 22, 1876, 19 U. S. Sts. at Large, 96.

By the act of June 5, 1882, the court as re-established was to exist for two years, but by the act of June 3, 1884, (23 U. S. Sts. at Large, 33), it was provided that the existence of the court "be, and the same is hereby, continued and extended to the thirty-first day of December, in the year eighteen hundred and eighty-five, with the same effect, and no other, as if said last named day had been named in the said act for the termination of the powers of said court; and said act is hereby continued in force during the period of extension hereby authorized."

The complaint of the plaintiff is, that the judges of this court, of whom the defendant was one, on July 25, 1885, passed an order as follows: "Ordered, that for the reasons set forth in the rule to show cause, and in the statement accompanying this decree and made a part thereof, the said Jerome F. Manning be, and he hereby is, prohibited from appearing and acting in this court in relation to any matter or business therein pending, and from exercising in any way the functions of an attorney and counsellor of this court. This decree to stand until further order of the court." The reasons are set out in the preamble to the order, which is made a part of the record. It appeared that the court, established by the act of June 23, 1874, had adopted rules, of which Rule V. was as follows: "Any person of good

moral character admitted to practise as attorney or counsel in the Supreme Court of any State or Territory, or the District of Columbia, or in any of the Federal courts, on filing with the clerk a written statement of the date and place of such admission, with his name and post-office address in full, may, on motion, be admitted to practise in this court." The plaintiff had been duly admitted as an attorney in the courts of this Commonwealth and in the Supreme Court of the United States, and in the Court of Claims, and was on January 26, 1875, on motion, admitted to practise in the Court of Commissioners of Alabama Claims. The court, which was re-established by the act of June 5, 1882, adopted the old rules, and made certain additional rules, one of which is as follows: "Rule XIV. All attorneys admitted to practise in the Court of Commissioners of Alabama Claims, as created under the law of Congress approved June 23, A. D. 1874, will be recognized as attorneys in this court, re-established under the law of Congress, approved June 5, 1882." The plaintiff was recognized as an attorney by the court as re-established, and as such had filed and was prosecuting many claims before the court. It does not appear that the plaintiff himself was a claimant in any cause, or that he had any business before the court except as an attorney for others.

The plaintiff contends that the judges who, in fact, composed the court on July 25, 1885, were not lawfully in office, and particularly that the defendant French was not then lawfully in office. It appears that French was commissioned and qualified as judge "on or about July 5, 1882." The argument is, that, as by the act of June 5, 1882, the existence of the court was limited to two years, the commission of Judge French had expired before July 25, 1885, when the court passed the order of which the plaintiff complains. It is contended that, when the existence of the court was continued beyond two years by the U. S. St. of June 3, 1884, it was necessary that the judges be reappointed in order lawfully to hold their office during the continued existence of the court.

We deem it unnecessary to consider whether the plaintiff's rights in the matter of his complaint would be greater against a judge *de facto* than against a judge *de jure*. It does not appear that the judges were originally commissioned for any

definite time. The acts of Congress do not prescribe any definite term of office. If they were judges within the meaning of § 1 of Article III. of the Constitution of the United States, they held their offices during good behavior; if not, they held their offices during the pleasure of the President, subject to the laws regulating the tenure of office. In either case, they would cease to hold their offices when the court ceased to exist, and they would continue to hold their offices while the court continued to exist, unless they were lawfully removed. It was within the power of Congress, by statute, to extend the existence of the court before the original term of its existence expired, and the judges by virtue of their original appointment continued to be judges while the court continued to exist. The plaintiff contends that the court had no power to admit attorneys to practise before it, and no power to prevent any person from practising before it. One argument is, that this was not an inferior court of the United States, within the meaning of § 1 of Article III. of the Constitution of the United States. We assume, without consideration, that it was not such a court, and that, like the courts of the Territories of the United States, it had only the powers which the statutes conferred upon it. *American Ins. Co. v. Canter*, 1 Pet. 511. *Clinton v. Englebrecht*, 13 Wall. 484.

Under the powers granted by the acts of Congress, and especially under the power granted by § 8 of the act of June 23, 1874, we are of opinion that the court, having authority to make rules for regulating the forms and modes of procedure before it, and for carrying into full and complete effect the provisions of the act, had, as included in this grant of power, the authority to make rules for the admission of persons to prosecute claims before the court as agents or attorneys for claimants. It is manifest that it was not intended by the statutes that claimants should be compelled personally to present their claims. The court established by the act of June 23, 1874, had established and published rules of procedure, including a rule for the admission of attorneys; and Congress, by the act of June 5, 1882, re-established the court, with the powers conferred by the former act, and provided that the practice and proceedings established and directed by that act should be followed, "except as changed or modified by this act";

and no change or modification was made by the act of June 5, 1882, in the power of the court to make all needful rules and regulations.

If the court had the power to prescribe by rule the qualification of attorneys to be admitted to practise before it, the court had the power to determine whether the persons who asked to be admitted had the requisite qualifications, and whether persons who had been admitted retained the requisite qualifications. The power of the court to determine whether an attorney already admitted was a fit person to remain an attorney, is involved in the general power to make rules for the admission of attorneys. The plaintiff has not been deprived of his office of attorney at law by the order complained of. The fact that he had been admitted as an attorney at law in the Supreme Court of the United States, in the courts of Massachusetts, and in the Court of Claims of the United States, did not confer upon him the right to practise before the Court of Commissioners of Alabama Claims, and the order complained of has not removed him from the bar of any of those courts. The proceedings against the plaintiff were not in the nature of proceedings for contempt. The rule to show cause was, that he appear and show cause why his name should not be stricken from the rolls of attorneys and counsellors at law authorized to practise before this court, "because of flagrant unprofessional conduct." Congress, as we construe the statutes, saw fit to grant to the Court of Commissioners of Alabama Claims the power to determine who should practise before it as attorneys, and in the exercise of this power, after notice to the plaintiff and a hearing, that court prohibited the plaintiff from further exercising before it the functions of an attorney of the court. Congress had the right to confer this power exclusively upon that court, to be exercised as a judicial power, and the judges of the court are not liable to individuals for judicial acts done within their jurisdiction. *Randall v. Brigham*, 7 Wall. 523. *Randall, petitioner*, 11 Allen, 473.

Exceptions overruled.

JULIA E. WARNER vs. JULIA A. MORSE & others.

Norfolk. January 30, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Will — Codicil — Trust — Equitable Lien — Statute of Limitations.

A testator, after bequeathing all his estate, consisting of personalty, to his wife absolutely, revoked by a codicil "so much of said legacy as gives to my said wife, N., my property forever, she to hold said property during her life. I give and bequeath, at her decease, the said property to J. and her son, H., for their use and behoof forever." *Held*, that the wife took a life estate, and J. and her son the remainder.

An equitable lien in real estate, purchased in the name of such testator's wife, and partly paid for with the funds of the estate, was *held* to be rightly established to the extent of such payment in favor of J., who had succeeded to her son's interest, upon a bill in equity to establish such a lien brought by her after the wife's death, and more than six years after the purchase; and the statute of limitations is no bar to such a bill.

FIELD, J. This is a bill in equity, filed November 13, 1886, by Julia E. Warner, formerly Julia E. Baker, against the heirs at law of Nancy M. Johnson to establish a trust in, or an equitable lien on, land in Norwood. George W. Johnson, who died on November 4, 1874, by his will gave all his property to his "wife, Nancy Morse Johnson, to have and to hold the same to her, her heirs, executors, administrators, and assigns, to her and their use and behoof forever"; but by a codicil revoked "so much of said legacy as gives to my said wife, Nancy, my property forever, she to hold said property during her life. I give and bequeath, at her decease, the said property to Julia E. Baker and her son, H. Willie Baker, for their use and behoof forever."

The single justice who heard the case was of opinion that Mrs. Johnson was entitled to a life estate in the property, and Mrs. Baker and her son Willie to the remainder; and we think that this construction is correct.

It appears from the findings of fact which have been filed in the case, that George W. Johnson left only personal property, and that Otis Johnson was appointed administrator of his estate, with the will annexed. The administrator, after paying the

debts and expenses of administration, would hold this property upon a trust, to pay the income to Mrs. Johnson during her life, and on her death to convey the principal in equal shares to Mrs. Baker and her son, Willie Baker. If the administrator delivered the property to Mrs. Johnson, she would hold it upon the same trust, and we infer that the administrator, after paying the debts and expenses, transferred the whole property or its proceeds to Mrs. Johnson.

It is found as a fact, that Willie Baker died, and that his mother was his "sole heir"; and we infer that this means that the interest of Willie, in some form, has become the property of his mother, who by marriage has taken the name of Mrs. Warner. It appears, also, that the administrator collected \$700 "life insurance," to which Mrs. Johnson "was entitled upon the death of her husband," and that he, with the consent of Mrs. Johnson, mingled this with the assets of the estate, and charged himself with it, and settled his accounts with the assent of Mrs. Johnson and Mrs. Baker. The probate accounts are annexed to the papers, but they are not specifically referred to in the pleadings or in the facts found, or in the decree, and we doubt if they could be considered except by agreement of the parties. Both parties, however, in their briefs and at the argument, referred to these accounts, and we think that it was understood that they were to be considered by the court. They show that the sum of \$734.52 was received by the administrator from insurance, and that he charges himself with this sum as property belonging to Mrs. Johnson. The accounts also show that money and property exceeding in amount the sum received from insurance, besides the \$2,000 paid for the land in dispute, were transferred to Mrs. Johnson by the administrator from the assets of the estate.

If it be true that all the net proceeds of the assets of the estate have been in some form transferred to Mrs. Johnson, as they were all trust property, Mrs. Baker can follow the property, wherever it can be identified and whatever form it may have assumed, into whosoever hands it may have passed, except into the hands of a purchaser for value without notice of the trust, unless by her conduct she has precluded herself from claiming it. The amount of the principal of this trust property, so

far as Mrs. Johnson has received it, is also a debt against her estate.

This bill is brought to recover the parcel of real estate, either on the ground that Mrs. Johnson held it in trust to be conveyed to the plaintiff after her death, or on the ground that it was purchased with money belonging to the trust. The bill also alleges, that, if the plaintiff is not entitled to have this real estate conveyed to her, she has an equitable lien upon it for the payment of such a sum of money as the court may determine.

This real estate was purchased by the administrator on May 1, 1875, of one George B. Talbot, who conveyed it in fee to Mrs. Johnson. The administrator paid for it \$2,000 from the assets of the estate, and "it was not shown that the specific sum of \$700 insurance money was used for the purpose." The purchase was made and the conveyance taken in the name of Mrs. Johnson, with the consent of Mrs. Baker, and upon an "oral understanding and agreement between" Otis Johnson, the administrator, and "Mrs. Johnson, that it was to be the property of Mrs. Baker on the decease of Mrs. Johnson." The real estate has been mortgaged by Mrs. Johnson to secure the payment of \$200, which she received, and this mortgage is outstanding, and is admitted to be valid. Mrs. Johnson died on September 2, 1886, intestate, and her heirs, to whom the legal title to this real estate descended, are not purchasers for value. It is manifest that the whole claim of Mrs. Baker upon the estate of Mrs. Johnson cannot be settled in this suit, if there was trust property transferred to Mrs. Johnson besides what was used in the purchase of this land, because the allegations of the bill are confined to this real estate, and the personal representatives of Mrs. Johnson have not been made parties, but only her heirs at law. The principal difficulty is in determining, on the findings of fact, whether \$1,300 or \$2,000 of the trust property was used in the purchase of the real estate. If the personal representatives of Mrs. Johnson had been made parties, and the bill had been brought to recover the whole trust fund, and this exceeded \$1,300, and if Mrs. Johnson's estate was solvent, it would perhaps make little difference whether \$700 of the purchase money of the land was considered as derived from the money received from the insurance, or as derived from the trust fund, because

whatever of the principal of this trust fund Mrs. Baker does not receive out of the land is a debt against the estate of Mrs. Johnson, if Mrs. Baker is entitled to recover at all. But in the decision of this suit, as it stands, it is important to determine whether the whole or only a part of the purchase money of the real estate was derived from the trust fund.

The oral agreement that the real estate should be the property of Mrs. Baker after Mrs. Johnson's death cannot be carried into effect on account of the statute of frauds. It seems impossible, on any view of the facts, to maintain that Mrs. Baker is entitled to thirteen twentieths of the land by way of resulting trust. It does not appear that the \$1,300 and the \$700 were paid for distinct aliquot parts of the land. A trust resulting from a payment of a distinct portion of the purchase money of real estate arises, if at all, immediately on the payment of the money and the taking of the conveyance; and in this case Mrs. Baker could not have obtained a decree for thirteen twentieths of this real estate immediately after the conveyance was made to Mrs. Johnson, because the legal title to the \$1,300 was not then in Mrs. Baker. It was trust money, to the principal of which she was entitled only after the death of Mrs. Johnson.

The general rule is stated in Lewin on Trusts, (7th ed.) 766, as follows: "Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the court has usually given a lien merely on the land for the trust money and interest; but where the entire land is clearly the fruit of the trust fund, the *cestuis que trust* must upon principle have a right to take the land itself, whether the purchase was or not of the description authorized by the trust." Mrs. Baker's claim, therefore, must be either for the whole of the real estate, on the ground that it was wholly purchased with trust property, or to an equitable lien upon it for the payment of so much of the trust property as was used in the purchase.

It is contended that she is precluded from maintaining her bill because she consented to the purchase of the real estate with the trust money, although under an oral agreement that the real estate should become her property on Mrs. Johnson's death. It is manifest, on the facts found, that there was not any understanding or intention on the part of Mrs. Johnson or Mrs.

Baker, or the administrator, that Mrs. Baker should lose or release her interest in the property. They intended that the land should be hers on Mrs. Johnson's death. No one has been misled by the consent of Mrs. Baker to the investment in land. If a *cestui que trust*, being *sui juris*, consents that trust property be invested in a particular manner, this may preclude him from recovering damages of his trustee on account of the investment; but we see no reason why a beneficiary should be precluded from following the property, unless the consent is such as to show that he intended to abandon his right to the property. The administrator, Mrs. Johnson, and Mrs. Baker all intended that the real estate should be held according to the terms of the trust, and we think that Mrs. Baker has not lost her right to follow the trust property.

Although there is some reason for inferring from the probate accounts that considerably more than \$700 was paid to Mrs. Johnson from the assets of the estate of her husband by the administrator, and that it was the understanding of the administrator, Mrs. Johnson, and the plaintiff that this real estate should be considered as purchased wholly out of the assets of the estate, yet these facts have not been found by the justice who heard the case; and as the evidence is not reported, we cannot say that he ought to have found them. The payments of considerable sums of money by the administrator to Mrs. Johnson appearing in the probate accounts may have been explained by other evidence. The justice says in the statement of facts found by him, that "I was of opinion that Mrs. Warner was entitled to a decree establishing an equitable lien on the Norwood estate in her favor to the amount of \$1,300, that being the amount of the funds of the estate of G. W. Johnson (over and above the \$700 belonging to Mrs. Johnson personally) to which Mrs. Warner would be and was entitled on the death of Mrs. Johnson." This is in effect a finding that \$1,300 was the whole amount of the trust fund, and on this finding the decree is right. It is to be noticed that the plaintiff has not appealed from the decree. No claim has been made by the plaintiff for interest on the \$1,300 since the death of Mrs. Johnson, perhaps because she has been in possession. The statute of limitations is not a defence. *Davis v. Coburn*, 128 Mass. 377. The decree

must be affirmed, with costs. See *Pennell v. Deffell*, 4 DeG., M. & G. 372, 388; *Bresnihan v. Sheehan*, 125 Mass. 11; *National Mahaiwe Bank v. Barry*, 125 Mass. 20. *In re Pumfrey*, 22 Ch. D. 255. *Decree affirmed.*

J. Everett, for the defendants.

S. H. Tyng, (*C. C. Mellen* with him,) for the plaintiff.

MIRA BEALS vs. AUGUSTIN THOMPSON & others.

Suffolk. March 6, 7, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Libel — Privileged Communication — Evidence — Malice.

A letter written by a creditor to his debtor's husband, a rich man, informing him of her bad conduct before their marriage, for the purpose of compelling him or her to pay an antenuptial debt, which after her marriage she refused to pay under circumstances showing ingratitude on her part, is not a privileged communication.

In an action for libel brought by such debtor against her creditor, the latter admitted writing and sending the letter, and set up in defence the truth of its subject matter. At the trial, letters of the same general tenor as the letter in question, written by the creditor to her after her marriage, were admitted as showing malice, while they also tended to contradict his testimony; and a letter written by him to her before the marriage, which also tended to show malice, was admitted as contradicting his testimony. *Held*, that these letters were properly admitted in evidence.

TORT. The declaration alleged in substance, that, while the plaintiff was living happily with her husband, James H. Beals, a man of wealth and social position, the defendant maliciously wrote and sent to him three letters, "among other things charging the plaintiff, in substance, with having obtained money and other property from the defendant by false pretences; with having been guilty of dishonorable conduct, deception, ingratitude, falsehood, and dishonesty toward and with the defendant; with having insulted and betrayed the defendant's confidence; with having treated him meanly in return for his alleged friendship for the plaintiff; with having repudiated certain pretended debts

due from the plaintiff to the defendant; with having a violent, fitful, obstinate, and ugly temper, and with being partially insane, an adventuress and swindler"; that such charges were false and were known to the defendant to be such, but that the plaintiff's husband believed them to be true, and withdrew his confidence from the plaintiff, alienated his affections from her, was guilty of cruel and abusive treatment of her, separated from her and refused to live or cohabit with her; and that of such three letters the only one in the plaintiff's possession was annexed to the declaration. The declaration concluded as follows: "And the plaintiff says, that, by reason of the matters and things hereinbefore set forth and alleged, she has suffered great pain and distress of body and mind; has lost her home and the comfort and society of her said husband, and her domestic peace and happiness have been destroyed; that she has been, and is now, subject to the contempt, ridicule, and reproach of her friends and acquaintances, by reason whereof she has sustained great damage and injury."

The letter annexed to the declaration was not dated, and recited that for several years after 1881 the defendant had lent to the plaintiff, and expended on her behalf, various sums of money for the purpose of educating her for the stage, and in supporting her while fitting her for that profession, in taking care of her when ill, and in sending her South for the benefit of her health; and contained among other things the following:

"Rumors came to me from Boston of her intended marriage to some one. . . . The object all around seemed to be to have the intended marriage concealed until it should transpire. I did not interfere, as I had no disposition to do so, after I learned that she would marry great wealth, as I saw a chance to recover my loans. I have sent Mira a bill of all she has borrowed, and of bills paid by her direction. I also sent a note covering the amount, saying that she could sign and return the note, and have time enough to pay gradually from her allowances from you. She replied with the most unreasonable, insulting letter a woman could write, refusing to pay a cent. This after she had written me over and over again of her intention to pay it when able. I have her private letters asking for the largest portion of the money, and acknowledging its date of receipt. I can prove

the account easy enough, but I do not wish to drag her private business and letters into a court of law, where the evidence and her letters would tend to show her an adventuress, swindler, and obtaining money under false pretences. . . . It would take very much provocation to make me do anything to injure her, but I shall have my debt. If she was poor I would never ask it. Under the circumstances, I can see but one way for me, i. e. to go to the courts, prove the account and agreements by her private letters in my possession, get an execution, and wait until she comes in possession of property that can be levied upon. Aside from the insulting violation of my rights in this matter, Mira, seemingly as an excuse for her treatment of me, has lately accused me to her friends of a dishonorable act, which I can disprove by her letters. I have written to her to undo the wrong, or I should communicate the matter to you. I shall certainly exact reparation. It will be better for her reputation in Boston to do right by me. . . . I do not ask you to pay her debts, but to use your influence to have her do right, and not provoke me to take measures that will scandalize her in Boston and Lowell. . . . I have drawn this as mildly as the circumstances will allow, for I do not want you to think I am threatening to obtain money. I have plenty, and an income of \$9,000 a year. Mira has insulted and betrayed my confidence shamefully. . . .

"I must believe Mira is partially insane, for I believe from my heart she is one of the purest girls I ever knew. She is a gem of the first water when she is herself. Her brother here believes as I do, that she may be. I have loved Mira as if she was my own child, and I would strike down any man who would defame her. In this matter I can hardly believe the evidence of my own senses. I do not understand it. She talks rational enough. I have not presented her with a bill of two thirds I have paid out for her. . . . You may show her this if you wish. She has had nearly its counterpart within a few days. I asked her to show it to you. . . .

"The bill sent to Mira is only \$2,882. She is entitled to \$115 salary to come out. If I charged all I ought to, her bill ought to be at least \$4,000. If she had not insulted my kindness and accused me of a dishonorable intention, I should not press things."

Writ dated December 29, 1887. The answer admitted that the defendant "wrote and sent to James H. Beals, the late husband of plaintiff, the letter or letters mentioned in plaintiff's declaration, but says that the same was or were written and sent lawfully, and was or were privileged, and that the same was or were true, and written and communicated without malice." Trial in the Superior Court, before *Mason, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff offered in evidence several letters which the defendant sent by mail to the plaintiff after her marriage, "some of which were received by her previous to her alleged separation from her husband, some before her husband received from defendant the letters mentioned in plaintiff's declaration, while others were received by her after her divorce from her husband." These letters, which were eleven in number, and with two exceptions were not dated, and which were of the same general tenor as the letter annexed to the declaration, among other things accused the plaintiff of bad conduct of various kinds, including an attempt on her part to seduce him, and in them the defendant spoke of her as his wife. The defendant objected to the admission of these letters in evidence, but the judge admitted them for the purpose of showing malice.

The plaintiff also offered in evidence another letter, which was written to her by the defendant before her marriage, and was of the same general tenor as the other letters sent by him to her. In this letter the defendant repeatedly called the plaintiff his "wife." The judge admitted this letter in the cross-examination of the defendant, and after he had testified that the plaintiff had been guilty of various kinds of misconduct, and had attempted to seduce him, and had denied that he had ever addressed her as his wife, or had solicited from her any intimate relations.

The defendant asked the judge to rule, and instruct the jury, that each of the letters mentioned in the plaintiff's declaration was a privileged communication, and that therefore the action could not be maintained; but the judge refused so to rule, and instructed the jury that no privilege was shown. No one of the letters there mentioned was produced at the trial, except the one which was annexed to the declaration.

The jury returned a verdict for the plaintiff in the sum of \$30,000; and the defendant alleged exceptions.

J. L. Hunt, for the defendant.

R. M. Morse, Jr., (*F. A. Dearborn* with him,) for the plaintiff.

FIELD, J. This is an action of tort, in which the defendant is charged with writing and sending to the husband of the plaintiff a letter containing a false and malicious libel concerning the plaintiff. The defendant in his answer admits that he wrote and sent the letter, and he says that the contents of it were true, and that it was written and sent without malice; he also says that it was a privileged communication.

Letters of the defendant to the plaintiff were put in evidence, against the objection of the defendant, "some of which," as recited in the bill of exceptions, "were received by her previous to her alleged separation from her husband, some before her husband received from defendant the letters mentioned in plaintiff's declaration, while others were received by her after her divorce from her husband." The letters sent to the plaintiff after her marriage were admitted by the court, for the purpose of showing malice on the part of the defendant. The letter which was sent to the plaintiff before her marriage was admitted during the cross-examination of the defendant, and after he had testified to certain things in regard to which this letter tended to contradict him. This letter contained evidence of malice. With two exceptions, the dates of the letters do not appear, but they all plainly relate to the same subject, and to many of the same circumstances, and they must have been written with the same general purpose. As the defendant set up the truth of the matter contained in the letter sent to the plaintiff's husband, evidence of actual malice was competent. Pub. Sta. c. 167, § 80. *Perry v. Porter*, 124 Mass. 338. *Lothrop v. Adams*, 133 Mass. 471. *Commonwealth v. Damon*, 136 Mass. 441.

We think that all of the letters sent to the plaintiff contain abundant evidence of malice on the part of the defendant, and that they are all so connected with the publication declared on as to be relevant upon the issue of malice. Some of them, including the letter sent to the plaintiff before her marriage, tended also to contradict the testimony of the defendant. They were all properly admitted in evidence.

The exceptions also state, that the court refused "to instruct the jury that each of the letters mentioned in plaintiff's declaration was a privileged communication, and that this action could not therefore be maintained," and "instructed the jury that no privilege was shown." No facts are recited in the bill of exceptions which tend to show that the occasion was privileged, except such as may be inferred from the relation of the parties to each other, and from the contents of the letters. Taking the case most favorably for the defendant, it is that the plaintiff owed a debt to the defendant for money lent to her before her marriage, which, after her marriage with a rich man, she refused to pay, under circumstances which showed ingratitude on her part, and that the defendant wrote a letter to the husband defamatory of the plaintiff, for the purpose of compelling him or her to pay the debt. This is not a lawful method of collecting a debt, or of compelling another person than the debtor to pay it. The defendant owed no duty to the husband to inform him of the bad conduct of his wife before her marriage, and the husband was under no obligation to pay the debts of his wife contracted before her marriage. There is no evidence that the defendant in sending the letter to the husband was acting in the discharge of any duty, social, moral, or legal. The ruling was right. *Gassett v. Gilbert*, 6 Gray, 94. *Krebs v. Oliver*, 12 Gray, 239. *Johannes v. Bennett*, 5 Allen, 169. *Shurtleff v. Parker*, 130 Mass. 293. *White v. Nicholls*, 3 How. 266.

Exceptions overruled.

THOMAS STOCK vs. CITY OF BOSTON.

Suffolk. March 11, 12, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Action — Sewer — Negligence — Freezing of Water Pipe — Proximate Cause — Contract.

A city, under contract with the owner of a greenhouse to supply him with water for steam-heating and for his plants, in constructing a sewer in an adjacent street caused the supply pipe to be uncovered and negligently exposed to the cold, so that the water in the pipe was frozen and his supply cut off. The

owner could not by the use of reasonable diligence obtain a supply of water or heat from other sources, and the plants were destroyed. *Held*, that the exposure of the water pipe was the proximate cause of the injury; and that the city was liable to such owner in tort for such damage, even if he might recover the same damages in an action upon the contract.

TORT for negligently exposing a water pipe connected with the plaintiff's greenhouse, while the defendant by its servants and agents was constructing a sewer in Minot Street, on December 2, 3, 1886, so that the water in the pipe froze, thus depriving the plaintiff of water for steam-heating in such greenhouse, and for use on his plants, whereby such plants were injured. Trial in the Superior Court, before *Lathrop, J.*, who allowed a bill of exceptions, in substance as follows.

The plaintiff's evidence tended to show that the sewer was being constructed by one Gill, under a contract with the defendant, and that one Sheehan, by virtue of an appointment from the superintendent of sewers of the defendant city, acted as an inspector of Gill's work; that the plaintiff owned a greenhouse on Minot Street, and was a taker of Cochituate water from the city, and that the city water pipes which carried water to him ran through that street; that on Thursday, December 2, 1886, the weather was cold, the temperature being nearly at zero; that between eight and nine o'clock in the evening, the plaintiff discovered that the water had ceased to run in his greenhouse; and that he then went to the sewer trench and found the water pipe connected with the greenhouse exposed, and the trench open nearly fifty feet on either side of it. The plaintiff testified that the next morning he went again to the trench and notified the engineer that the pipe was frozen, and that he had no water in his greenhouse; and that he then spoke to Sheehan and Gill, who were standing near the trench, of the condition of the pipe, and the probable injury that would result to his property if it were not at once thawed out and protected; that, the pipe not having been thawed out, the plaintiff, on the Saturday morning following, went to the City Hall and notified the superintendent of sewers of its condition, and he directed that Gill be ordered to thaw out the pipe at once and protect it; that when the plaintiff went to the City Hall the flowers were considerably damaged; and that the pipe was not thawed

out until the Wednesday following, by which time the flowers were all ruined, with the exception of a few violets. The plaintiff further testified that when he notified Gill and Sheehan that the pipe was frozen the flowers were not injured; that they agreed to attend to the pipe at once, and that he believed that they would do so; and that it was impossible for him to obtain water and convey it to his greenhouse and protect his property.

The defendant asked the judge to instruct the jury that the plaintiff could not recover for the following reasons:

"1. Because the work of constructing the sewer was the work of public officers, and not of the agents of the city in its corporate capacity.

"2. That the damages were too remote, the water pipe being the water pipe of the city, and the water which was frozen being the water of the city.

"3. That the plaintiff's remedy, if any, was not for negligence in constructing the sewer, but for breach of contract in not supplying him with water."

The judge declined to give the instructions requested, but instructed the jury in substance as follows:

"The negligence alleged is in the not covering the pipe, or wrapping it so that it would not freeze; and, secondly, in not remedying the defect when there was ample time to remedy it before the plants were injured. . . . Now, gentlemen, if you believe the plaintiff's story on that point, as to the notice he gave, and as to the delay, you would be justified in finding that there was negligence and carelessness on the part of the agents of the city, and that the plaintiff would be entitled to recover, unless he was guilty of negligence, as I shall presently state to you. If, on the other hand, you believe the testimony of the defendant, that this thing was remedied the moment it was called to the attention of the city, then your verdict will be for the defendant; because, if the plaintiff, after knowing that this injury occurred, did not see fit to call the attention of anybody to it, and have it remedied, that would be evidence of such negligence on his part as would authorize you in finding a verdict for the defendant that he was guilty of carelessness. . . . The defendant says that the plaintiff was guilty of negligence in not remedying this trouble, in not getting water from some

where to water his plants and start up his boiler. Well, gentlemen, he has stated to you what efforts he made in that direction, and I instruct you that if he, by the exercise of due diligence, might have got water, then he would not be entitled to recover for the loss of his plants; because, if he could have remedied this trouble, and did not do so through his own lack of diligence, he cannot say that this large loss which was sustained was due entirely to the negligence of the city. . . . But if he exercised, — and that is a question of fact for you to determine, — if he exercised all due diligence, then the question comes whether or not the injury to the plants was too remote to be recovered in this action. Now upon that point there is testimony here that the agents of the city knew that that water pipe connected the greenhouse of the plaintiff with the main. There is no evidence that they knew it was necessary for the life of the plants that water should be used, but you will be authorized to find that they must have known that, from the general knowledge which everybody possesses as to the need of plants for water. If, therefore, the agents of the defendant knew that the water was cut off by freezing of the pipe, and knew that the water was necessary for the life of the plants, and the plaintiff has testified here that he told them everything would be destroyed unless they did do something, and they carelessly and negligently suffered the water to remain cut off for several days, and in consequence of that the plants were destroyed, then it does not seem to me that the damage is too remote for you to consider, but that the plaintiff is entitled to recover, if he used all due diligence in preventing it, under the principles of law which I have previously stated to you.”

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. M. Babson, for the defendant.

E. B. Powers, (*S. L. Powers* with him,) for the plaintiff.

MORTON, C. J. The servants of the defendant, in constructing a sewer in Minot Street, uncovered a water pipe running to the greenhouse of the plaintiff. The jury have found that they were negligent in leaving it exposed for several days, in severely cold weather; that this caused the water in it to freeze, and thus cut off the supply of water of the plaintiff. While a city or town

is not liable in tort for injuries caused by the plan or scheme of a sewer laid out by the board of aldermen, it is liable for the negligence of its servants in carrying out the plan in constructing the sewer. *Emery v. Lowell*, 104 Mass. 13. *Murphy v. Lowell*, 124 Mass. 564.

The defendant contends that as in this case the water pipe belonged to the city, and it had a contract with the plaintiff for his supply of water, his only remedy for the loss of water was upon such contract. The fact that the water pipe belonged to the city is not material. It was in the use and so far in the possession of the plaintiff that, if a stranger unlawfully interfered with it, to the injury of the plaintiff, he could maintain an action of tort. *Metallic Compression Casting Co. v. Fitchburg Railroad*, 109 Mass. 277. We think that the fact that the city had a contract with the plaintiff to supply him with water does not take away his right to sue in tort, even if the rule of damages is the same as in an action upon the contract. A mere breach of contract cannot be sued on as a tort, but for tortious acts, independent of the contract, a man may be sued in tort, though one of the consequences is a breach of his contract. *Ashley v. Root*, 4 Allen, 504. Suppose a lessor, who has covenanted to keep the leased premises in repair, should tortiously fire a cannon near the premises, breaking the windows, and otherwise injuring them. It would not be an answer to an action of tort to set up that the plaintiff had an action on the covenants of the lease. He could pursue either remedy. In the case at bar, the tortious acts of the city had no connection with, or reference to, its contract. They were independent acts, which gave the plaintiff a right to an action of tort, even if he had (which we need not decide) a concurrent remedy upon his contract.

The defendant contends that the damages suffered by the plaintiff were too remote. The damages were caused because the plaintiff, after the water was cut off, was unable to furnish water to his plants, and to supply his boiler with water, so as to heat the greenhouse. In *Derry v. Flitner*, 118 Mass. 131, it is said: "One who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are

caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated."

In the case at bar, the natural consequences of the tortious acts of the defendant in leaving the pipe exposed were that the water in it froze, the supply of the plaintiff was cut off, his means of furnishing water to the plants and heat to his boiler were destroyed, and his plants were killed. The jury have found that this happened without any negligence on the part of the plaintiff, as he could not, by the use of reasonable diligence, obtain a supply of water or heat from other sources. The case of *Metallic Compression Casting Co. v. Fitchburg Railroad*, 109 Mass. 277, is similar to the case before us. There the defendant negligently ran a train over a line of hose belonging to a third party, which the plaintiff was using to extinguish a fire in its factory. It was held that the severing of the hose was the proximate cause of the destruction of the building, and that the defendant was liable for its value. The instructions in this case were in accordance with the principles we have stated, and were correct.

Exceptions overruled.

ADOLPH S. DEUTSCH vs. ISAAC D. PRATT.

Suffolk. March 14, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Contract of Sale — Offer — Acceptance — Damages.

An offer of sale by telegram and letter, each dated June 8, was for "six tons car boxes free of Babbitt" metal, described as "a good lot," at eight and one eighth cents a pound. The offeree, upon receiving the telegram, at once telegraphed in

reply, "Seven three quarters best can do, wire if accepted," and, receiving no reply, on June 9, after receiving the letter, telegraphed again, "Will pay you eight cents for brass boxes," to which the offerer replied, "Your offer accepted; will ship what we have." *Held*, that the sale was of car boxes which should be free from Babbitt metal and a good lot.

The seller, who was a dealer in metals in Boston, thereupon shipped to the buyer, who was such a dealer in Cleveland, a lot of car boxes which was not a good lot or free from Babbitt metal, six tons however being free from it and constituting a good lot, and the eight hundred and forty eight pounds remaining not being thus free, but being of an inferior quality. The buyer, before the boxes were received or examined by him, paid the price agreed for the entire lot. *Held*, that the buyer could recover the difference between the price paid and the market value in Boston of the whole lot as it was, and not merely the difference between the price paid for the eight hundred and forty-eight pounds as a part of the lot and the value of that portion there.

CONTRACT, with a count in tort alleged to be for the same cause of action, for the breach of an agreement of sale. Writ dated August 23, 1887. Trial in the Superior Court, without a jury, before *Barker, J.*, who reported the case for the determination of this court, in substance as follows.

On June 8, 1887, the defendant, a dealer in metals in Boston, doing business under the name of I. L. Pratt and Company, sent a telegram to the plaintiff, a dealer in Cleveland, Ohio, in scrap metals, doing business under the name of A. S. Deutsch and Company, with whom he had had previous dealings. This telegram was dated at Boston, addressed to the plaintiff at Cleveland, and read, "Can you use six tons car boxes free of Babbitt, eight one eighth, Boston. Terms as before. Wire answer." On the same day the defendant mailed from Boston to the plaintiff at Cleveland the following letter: "Boston, Mass., June 8th, 1887. Messrs. A. S. Deutsch & Co., Cleveland, Ohio: Dear Sirs,— We wired you to-day the following: 'Can you use six tons car boxes free of Babbitt, eight one eighth, Boston. Terms as before. Wire answer.' They are a good lot, and should like to ship them to you if not sold upon receipt of your early reply. We are, very truly, I. L. Pratt & Co."

The plaintiff received the telegram at Cleveland on June 8, and on the same day telegraphed to the defendant in reply, "Seven three quarters best can do. Wire if accepted." This telegram was received at Boston on the same day by the defendant, who made no reply to it. On June 9, the plaintiff received

the defendant's letter of the day before, and thereupon sent to the defendant a second telegram, as follows: "Will pay you eight cents for brass boxes. Wire if accepted." To this the defendant immediately telegraphed an answer as follows: "Your offer accepted. Will ship what we have."

Upon the receipt of this telegram the plaintiff on the same day mailed a letter to the defendant stating: "We wired you this A. M. as follows: 'Will pay you eight cents for brass boxes. Wire if accepted,' to which we received your answer saying: 'Your offer accepted. Will ship what we have.' Please ship as soon as possible, and bill them at the R. R. Co. as scrap zinc, to insure a low rate of freight."

Upon receipt of this letter the defendant shipped to Cleveland by railroad 12,953 pounds of brass car boxes, consigned to the defendant's order, the price of which at eight cents per pound, was \$1,036.24, annexing to the bill of lading his draft on the plaintiff for that amount. Before the boxes arrived at Cleveland, this draft was accepted and paid by the plaintiff, who thereupon resold them in Cleveland to a brass founder, at nine cents per pound. In making the purchase, the plaintiff relied on the defendant's telegram and letter of June 8, and resold the boxes on the representations made in the letter.

Upon the arrival of the boxes, the brass founder found them to be of a quality inferior to that which he had expected, declined to accept them, and returned them to the plaintiff, who thereupon, on June 24, wrote to defendant as follows: "We find the lot of brass boxes you sent us to be the worst lot we have ever handled, and look as if they were the refuse of some brass foundry. We had sold them on the representation you made us in yours of the 8th instant, and we are obliged to take them back solely on account of the poor quality."

The defendant, however, claimed it was a good lot of boxes, and refused to take them back or make any allowance.

The plaintiff claimed to recover of the defendant three cents per pound, or \$388.59, which was the difference in value at Cleveland, at the time of his purchase, between such boxes as he understood he was purchasing and those which he received.

The plaintiff understood from the defendant's telegram and letter of June 8 that he was purchasing car boxes made of red

brass, which form the best quality of car boxes for railroad cars, and are made to be used and are used without a lining of Babbitt metal and so are "free of Babbitt," and necessarily constitute a "good lot" of car boxes; and this was the understanding of the term "car boxes" in the metal trade at Cleveland, but the defendant was ignorant of that fact. The defendant—in common with other dealers in the metal trade at Boston, where the terms "car boxes," and "brass car boxes," and "a good lot of car boxes free of Babbitt" did not have a uniform meaning—understood the term "car boxes free of Babbitt" to include boxes made of yellow brass designed to be used with a lining of Babbitt metal, but which had not been so lined, or from which the lining had been removed, and the term "brass boxes" to include any brass car boxes, with or without a lining of Babbitt metal; but the plaintiff did not know in what sense the terms were used in the trade at Boston.

Of the 12,953 pounds of car boxes shipped to Cleveland 6,000 pounds were yellow brass boxes designed to be used with a lining of Babbitt metal, but never finished, lined, or used on cars, being cast by a mistake from the wrong pattern; of the remaining 6,953 pounds, 6,473 pounds were yellow brass car boxes designed to be used with a lining of Babbitt metal, and which had been so used, but from some of which the lining had not been removed. The defendant bought these 12,473 pounds from a brass founder in one lot, and the remaining 480 pounds were a miscellaneous lot which he had in stock on June 9, some of red brass without a lining of Babbitt metal, and some of yellow brass with such lining. In the whole lot of 12,953 pounds there were 848 pounds of boxes from which the Babbitt metal had not been removed. The fair market value at Boston on June 9 of car boxes of yellow brass with a lining of Babbitt metal in them was five cents per pound.

The defendant supposed that the lot of 12,473 pounds was free from Babbitt metal, but knew that the miscellaneous lot of 480 pounds was in part composed of boxes so lined. In preparing his telegram and letter of June 8, he had in mind only the larger lot which he was then about purchasing, and the sending of the smaller lot as well to the plaintiff was an afterthought; but he understood that boxes lined with Babbitt metal

were a good delivery under the plaintiff's telegram of June 9, offering to pay "eight cents for brass boxes." He had no intention to cheat the plaintiff in any part of the transaction, and none of the statements in his communications to the plaintiff were intentional misrepresentations.

All of the boxes were brass car boxes of good quality of their respective kinds, but owing to the presence of the lined boxes the whole lot shipped was not "a good lot," or "free from Babbitt."

The fair market value of the whole lot in Boston on June 9, was seven cents per pound, or \$129.53 less than the price paid by the plaintiff. The 848 pounds of boxes lined with Babbitt metal were worth in Boston \$25.44 less than the price paid for them in the lot by the plaintiff.

The judge ruled that the sale was made at Boston; that the language used by the parties in making it was to be construed in accordance with its meaning in the trade in Boston; that upon the facts before recited the plaintiff was entitled to recover in the action; and that the measure of his damages was the difference on June 9, at Boston, between the value of the whole lot of boxes actually shipped and that of an equal quantity of a good lot of miscellaneous brass car boxes free from Babbitt metal; and found for the plaintiff in the sum of \$129.53.

If the rulings and finding were correct, judgment was to be entered thereon; otherwise, such judgment was to be entered as law and justice might require.

O. B. Mowry, for the defendant.

C. Q. Tirrell, for the plaintiff.

FIELD, J. No objection has been taken to the ruling of the court, as recited in the report, "that the sale was made in Boston; that the language used by the parties in making it was to be construed in accordance with its meaning in the trade in Boston." The court has found that "in making the purchase the plaintiff relied on the defendant's telegram and letter of June 8," etc. It has also found that the "defendant understood that boxes lined with Babbitt metal were a good delivery under the plaintiff's telegram of June 9, offering to pay 'eight cents for brass boxes,' " and that the defendant "had no intention to cheat the plaintiff in any part of the transaction," etc. We think that it was

competent for the court to find, on the evidence contained in the report, that the plaintiff's telegram of June 9, considered with reference to the circumstances under which it was sent, referred to the boxes which had been described in the defendant's telegram and letter of June 8; that the plaintiff intended that it should be so understood; and that the defendant, as a reasonable man, ought so to have understood it. It was therefore competent for the court to find that, by the true construction of the telegrams and letters of the parties, the defendant agreed to sell, and the plaintiff to buy, car boxes which should be free from Babbitt metal and a good lot.

When a contract is entered into by written correspondence, the construction of the writings is for the court, if all the facts which can affect the construction are agreed or found, and in the absence of fraud, accident, or mistake one party cannot be heard to say that in his own mind he understood the correspondence in a different sense from that given to it by the court. The effect of a written contract cannot be varied by any understanding of its meaning entertained by only one of the parties, which was not, at the time of making the contract, communicated to the other party or parties. *Miller v. Lord*, 11 Pick. 11, 24. *Sawyer v. Hovey*, 3 Allen, 331.

It is manifest from the report, that the court found, either that there was a contract for the sale of a good lot of car boxes free from Babbitt metal, or that the minds of the parties did not meet, and that no contract was made. The court expressly found that "the whole lot shipped was not 'a good lot,' or 'free from Babbitt.'" If there was such a contract, as the plaintiff paid for the boxes without examining them, relying upon the representations of the defendant that they were a good lot and free from Babbitt metal, and as the representations were false, the plaintiff could maintain his action to recover the difference between the value in Boston of the whole lot as it was, and what would have been the value if the lot had been as represented. If there was no contract, the plaintiff could recover the difference between the price paid and the value in Boston of the lot as it was. The court, in effect, has found that the price paid was the value of the car boxes in Boston if they had been as represented, and therefore the

damages are the same in amount whether there was a contract or not. It is the difference between the price paid and the market value in Boston of the whole lot as it was, which the court has taken as the damages. We cannot say that there is any error in this.

The defendant contends that, as there were only eight hundred and forty-eight pounds of boxes lined with Babbitt metal, and as these were worth in Boston only \$25.44 less than the price paid for them as a part of the lot, the plaintiff, if he can recover at all, can recover only this sum. But the boxes lined with Babbitt metal were mixed with the others, and were a substantial part of the whole, and it would require time and labor to separate them from the rest. If the plaintiff had known the character of the lot sent him, he could have rejected it altogether, and he was not required to select and receive the part which conformed to the representations. The plaintiff never ordered or bought a lot of car boxes free from Babbitt metal mixed with boxes lined with such metal. The fact that, after the boxes lined with Babbitt metal were taken out, there were more than six tons of boxes, does not help the defendant, for the court may well have found that the plaintiff's offer was to buy all the boxes of a given description which the defendant had, and that the defendant accepted this offer, and sent the whole lot as a performance of this part of the contract.

Judgment on the finding.

BOSTON BLOWER COMPANY vs. JAMES O. BROWN & others.

Suffolk. March 14, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Written Agreement — Independent Stipulations — Former Verdict —
Res Judicata — Estoppel.*

An agreement in writing between a machinist and a firm provided that the former should make for the latter one hundred machines in good workmanlike manner, at specified prices, according to certain drawings and specifications, and that the firm, within ninety days after the delivery of the machines, should make a

new contract with him, to be mutually satisfactory, for not less than one hundred machines more, failing to do which the firm was to take and pay for such special tools specified in the contract that the machinist might make or purchase for building the first machines as remained in serviceable condition. After the first machines were delivered and paid for, the firm brought an action to recover damages for defects therein, and subsequently, after the firm's refusal to make a new contract or to pay for the tools, the machinist brought an action against it to recover for the value of the tools. *Held*, that the stipulations of the parties were independent, and that the recovery by the firm in the first action was not a bar to the second action. *Held, also*, that it was immaterial that the tools were merely supplementary to the ordinary tools of a machine-shop, and were such that with them alone the firm could not construct such machines.

For the purpose of making such machines, the machinist bought certain tools other than those specified in the contract, but necessary for the work. *Held*, that he could not recover from the firm the value of those tools, although they were useless to him, and were of use only for the purpose of building the firm's machines.

In the first action, the firm, in addition to damages for such defects, sought in another count to recover payments, of which it put in evidence, made by it to the machinist on an open account between them for extra work, but the verdict in that action, although a general one, was alone entered upon the count for such damages; and in the second action, the machinist, in addition to the value of such tools, sought to recover the balance of such open account after deducting such payments. *Held*, that the machinist was not estopped from recovering such balance, as well as the value of such tools.

DEVENS, J. This was an action in three counts, brought against the defendants, doing business under the name of the Brown Quadricycle Company. The first count of the declaration is upon a contract in writing. By this contract the plaintiff agreed to make for the defendants one hundred quadricycles, according to working drawings furnished it, "in all respects well constructed, of good material, and in good workmanlike manner." The defendants were to furnish the necessary working drawings therefor, complete in all details, and agreed that they would "accept and pay for all machines constructed according to the terms of this agreement," conformably to a list of specified prices, "upon being notified that they are ready for delivery," in cash, or in certain described notes.

The first count of the plaintiff's declaration is upon the last clause of this contract, which is as follows: "The Brown Quadricycle Company agrees that, within ninety days after the delivery of the last machines of the number hereby contracted for, it will make with the Boston Blower Company a new contract, which shall be mutually satisfactory in all details, for not less

than one hundred machines; and if said Quadricycle Company fails to do so, that it will take and pay to the Boston Blower Company, in cash, the agreed value of all patterns, jigs, and special tools, according to the schedule marked B, hereto annexed, which may have been made or purchased by the Boston Blower Company for building quadricycles agreeably to this contract, and which remain in good serviceable condition, ordinary wear and tear excepted, as per said schedule marked B." In this schedule, each tool was carried out at a separate price.

By the facts as found by the auditor it appears that the plaintiff constructed the first mentioned one hundred quadricycles, completing them on November 18, 1884, when they were delivered to and accepted by the defendants, who gave the notes therefor as provided in the contract, which notes the plaintiff subsequently collected.

The defendants have never made any new contract with the plaintiff, nor have they paid for the special tools enumerated in schedule B, the value of which has been found by the auditor, and by the justice of the Superior Court, sitting without a jury, to be \$1,846.45. The ninety days within which the defendants were to make a new contract, or pay for the tools, began to run on November 18, 1884, if ever, and terminated on February 16, 1885. In May, 1885, the defendants claiming to have discovered that the machines furnished and received by them were imperfectly constructed, brought an action against the plaintiff, for damages thus sustained, in the Superior Court. The declaration included counts for other alleged damages, but a verdict was recovered by the present defendants in the sum of \$1,250 on the count alone which alleged the damages sustained by the improper and faulty construction of the machines by the plaintiff. This verdict was put in evidence by the defendants, contending that it disposed of the whole subject matter in controversy, and that no action could now be maintained to enforce any obligation of the defendants to make a new contract, or to take and pay for the specified tools.

No judgment has been rendered upon the verdict of the jury in the prior action, and it might be questioned whether, until this is done, the verdict would be sufficient to estop the plaintiff from maintaining this suit, even if it would be if it had passed

into a judgment. It is the verdict with the judgment upon it which constitutes an estoppel of the party against whom it is rendered, and makes a *res judicata* of any fact without the existence, proof, or admission of which it could not have been rendered. *Hawks v. Truesdell*, 99 Mass. 557 *Burlen v. Shannon*, 99 Mass. 200. In a suit at common law, judgment on a verdict is the necessary and immediate result, unless it be set aside, or unless some motion in arrest thereof be filed. No suggestion has been made that judgment cannot at once be entered, and both parties in argument have dealt with the case at bar as if their rights were respectively determined by the verdict. We do not think it necessary, therefore, to consider whether, to be available for the purpose for which the defendants seek to use it, judgment should properly have been rendered thereon.

In the prior action, no attempt was made on the part of the then plaintiffs, the present defendants, to avail themselves of the claims which form the subject of the present action, either by way of set-off, recoupment, or otherwise. It was, however, ruled by the auditor, which ruling was affirmed by the Superior Court, that the verdict in the former action was a bar to the plaintiff's recovery upon its first count, being that for the recovery of the value of the specified tools, which we are now considering.

It is the contention of the defendants, that the completion of the machines originally contracted for in strict compliance with all the contract requirements was a condition precedent to the obligation to pay for the tools; and that if, in the first action, it had recovered but a single dollar, it would be released from any further performance under the contract.

It is evident, from the character of the contract, that it required from the plaintiff, in order to make the machines desired by the defendants, expensive preparations in the way of peculiar tools, comparatively valueless for any other purpose than the construction of these machines; that it was seen by both that it would not be compensated unless more than a hundred machines should be made; and that therefore the defendants agreed to pay for the same, unless a new contract should be made for at least a hundred more at a price which

should be satisfactory to the plaintiff. Of course it could not be expected that such a contract would be entered into unless in some form the plaintiff could obtain payment for the tools, as it would by making the new contract at such a rate that it could afford to disregard the expenditure bestowed upon them.

It is said, that, if in any respect the plaintiff failed to perform its original contract, it could not be expected that the defendants would be ready to make a new contract with the party thus failing. An agreement to make a new contract, mutually satisfactory, is evidently one which could never be enforced, as it depends on the will, or even the caprice, of either. *Brown v. Foster*, 118 Mass. 136. The intent of the original contract was obviously to provide for the payment for the tools although a new contract might be substituted for this, and such is its effect. The inquiry is, therefore, whether this agreement is available only upon the exact completion of the machines as they are described in the contract, and whether, if they failed in any detail to meet its requirements, the obligation of the defendants was discharged. There is certainly no express condition that this shall be so, and a provision so onerous in its character should appear in clear terms. The defendants deduce an argument from the fact, that, as the defendants agree to make a new contract, or, failing to do so, to pay for the tools "within ninety days after the delivery of the last machines of the number hereby contracted for," the word "delivery" must be delivery in strict accordance with the terms of the contract, and, there having been no such delivery, no obligation exists to pay for the tools. But the defendants received the machines and accepted the same under the contract, have never rescinded it, but have obtained their damages therefor, so far as there was a failure in the performance of any details in the work upon them.

Nor can we concur with the defendants, that, even if the contract is not expressly conditional, it must be implied in law, as a condition precedent, that all particulars of the original contract were to be complied with before the defendants were bound to make a new contract or pay for the tools. That a stipulation, when it is not so made in express terms, should be

construed as a condition precedent, must result from the nature of the act to be done, and the order in which they must precede and follow each other in the progress of performance.

Where one stipulates to build a house, or manufacture an article, from materials to be furnished by another, the failure to furnish such materials would release the party thus stipulating; where the non-performance on one side goes to the entire substance of the contract, so that it may fairly be inferred that, if the act to be performed on one side is not done, there is no consideration for the stipulations on the other side, the party making them would be released therefrom. Such would not be the case when the injury was but partial. "Though there be a breach of an express or implied covenant on one side, attended with some loss and damage to the other, yet if it does not go to the whole consideration, and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non-performance of which the other party is absolved from the performance of the stipulations on his part." Shaw, C. J., in *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 439. *Cadwell v. Blake*, 6 Gray, 402.

Applying these principles to the case at bar, the consideration of the defendants' promise was not merely the construction of the machines, but involved the making of the tools required therefor by the plaintiff. These machines the defendants have accepted, and, so far as they were defective in construction, have been compensated therefor; and when it is found that the tools are fit for the special work for which they were intended, they ought not to be relieved from their obligation to pay for them. Even if the completion of the machines in all respects according to the contract could have been treated as a condition precedent to their liability to pay for the tools, it is not easy to see how the defendants can now rely upon it as such. Assuming that at the time they discovered the defects in the construction of the machines they could then have withdrawn their acceptance of them and rescinded the contract, they did not do so, but, relying on the contract, recovered damages to the extent to which it was found to have been broken. The defendants stand pecu-

niarily in the same position that they would have occupied in all respects if the machines had corresponded with those called for by the contract. Having had full compensation for the injury occasioned by these defects, they cannot claim in addition to be released from the obligations they have assumed. *Kenworthy v. Stevens*, 132 Mass. 123. *Snow v. Alley*, 144 Mass. 546, 556.

The defendants rely on *Gates v. Ryan*, 115 Mass. 596, and *Butler v. Suffolk Glass Co.* 126 Mass. 512, as establishing the proposition, that, having recovered in the action heretofore brought, it must have been there considered that they were released from the further performance of their stipulations to the plaintiff. But in the cases referred to the stipulations of the parties were not independent, but dependent the one upon the other. In order to ascertain what damages one had sustained, it was necessary to consider that he would be released from his own stipulations by the failure of the other to perform, and that therefore in the previous cases brought against the parties, the plaintiff's damages must have been computed on the ground that the contract was wholly broken, and that the party then suing was not bound further to perform. The parties originally suing had in those cases received no benefit. In *Gates v. Ryan*, the defendant in a former action had recovered damages, because Gates was wholly unable to perform any part of his contract, which would necessarily release Ryan; and the measure of his damages was held to be the fair value of the contract made by Gates over that which Ryan had still to pay or perform in consideration for it. In *Butler v. Suffolk Glass Co.*, a prior action had been brought against the plaintiff for an entire failure to perform his contract, in which the defendant had recovered substantial damages, and in which the judgment was for the damages sustained by the defendant in consequence of the non-performance, which must have been computed in view of the fact that the defendant had been released, by the failure of the plaintiff to perform, from the further performance of its undertakings under the contract. The defendant had therefore been permitted to recover back all that it had paid under the contract. Such a case was there presented as would here exist if in the former action it had

appeared that the plaintiff had wholly failed to perform its contract, so that no benefit had accrued therefrom to the defendants, and the defendants had brought an action for damages by reason of such breach of the contract.

In the prior action, as actually brought, the defendants had not sought by reason of the entire non-performance of the contract to recover damages therefor, nor had they treated the contract as rightfully rescinded. The computation by the jury could not have been made on the ground that the defendants were wholly released from the contract, but upon the theory that they were held thereto, and were entitled to appropriate damages, because, while the defendants had received and retained the machines constructed by the plaintiff, such performance of its contract had not been as thorough and complete as it should have been, but had in certain particulars been defective. It is expressly found that, as matter of law, it was ruled by the court in the prior action that there had been no rescission of the contract, and that the machines as constructed belonged to the defendants. It appears also that the verdict was rendered solely on the count in that suit for damages sustained by the defendants by reason of the faulty construction of the machines. In that action the plaintiff did not in any manner seek to diminish the damages of the defendants on account of its claim for the value of the patterns, jigs, and special tools described in schedule B, heretofore mentioned.

For the reasons heretofore stated, we are of opinion that it was erroneously ruled, in the case at bar, that, because the first one hundred machines were not in all respects made according to the contract, the defendants were not obliged to make any further contract, or to pay for the special tools, etc. made or purchased for the construction of those machines.

As the report finds in the alternative, should the former verdict be held not to be a bar to the present action for the value of the special tools, that judgment should be entered for their value as found by the auditor, we proceed to consider the findings upon this point, and for what portion of these tools there may be a recovery. It is found that the plaintiff did not make or use twenty-six tools, etc. which were included in schedule B, to the value of \$270.05, and, as the plaintiff does not seek

to recover for these, they may be dismissed from further consideration. It is also found that the special tools which were made, and also certain extra tools, for which the plaintiff seeks compensation, were in good and serviceable condition. It was further found that a quadricycle could not be actually constructed according to the contract with the tools in schedule B which were made or purchased by the plaintiff for the construction of the quadricycles, and that the plaintiff in fact used forty-one extra tools not enumerated in schedule B, amounting in value to \$330.50. For these extra tools the defendants never agreed to pay, according to the finding of the auditor, affirmed by the judge presiding at the trial, and it was ruled correctly that the defendants were not liable therefor.

If entitled to recover, it was therefore held that the plaintiff was entitled to recover the sum of \$1,846.45, being the value of the special tools enumerated in the schedule which were actually made or purchased. These tools were valueless except for the purpose of making quadricycles, and the defendants contend that they cannot be justly held to pay for them, when with them a quadricycle could not be made in accordance with the original contract, or its modifications. There was no obligation by the contract to construct all the tools enumerated in the schedule, each of which was set down therein at a separate price, nor was it contemplated that with the tools enumerated a quadricycle could be made. It was a list of special tools only, patterns, jigs, etc., which a machine-shop might not have, and which, so far as the plaintiff was compelled to obtain them, it was to be compensated for in case no additional contract was made, because they would not be required as a part of its general equipment. So far as they went, they might be of value to the defendants if they desired to engage in the manufacture of quadricycles, or to contract with another machinist, even if other tools must also be used. The fact that with them a quadricycle could not be made, and that others would also be required, was not therefore important. It was correctly held, also, that for the extra tools made by the plaintiff, and not enumerated in the schedule, there could be no recovery. If the changes in the construction of the machines to which the plaintiff assented compelled the making of these tools, and if the defendants did not

agree to pay for them, it must be deemed that the changes were for the advantage in some way of the plaintiff, or were for other reasons satisfactory to it. There is no evidence that any of the extra tools actually made were substituted for those in the schedule by any express agreement, and such agreement cannot be inferred from any consent by the plaintiff to changes in the construction of machines, although the necessity for them may have resulted therefrom.

The second count of the plaintiff's declaration is for the recovery of certain items upon a so called open account, the third count being for the recovery of the balance due upon a certain check given for a portion of the same account, upon which two payments of \$100 each had been made. These counts may therefore conveniently be considered together, the check referred to in the third count having been given in partial payment of the account sought to be recovered in the second. The open account is found to consist wholly of items relating to the machines built under the contract and the modifications thereof; these "items were done and furnished both during the construction of the machines and afterwards, but under contracts independent of the original contract and its modifications." The defendants contend that some of these items grew out of, or were derived from, the modifications of the original contract, but we do not understand that they dispute its correctness, or that the charges for interest therein for work and for materials furnished, as found by the report, were not properly made.

Their contention is, that it was put in issue in the former action, and there became the subject of adjudication. In that action the declaration consisted of four counts. The first was for damages on account of defects in the construction of the machines; the second was waived; the third was in the nature of trover to recover certain notes and moneys advanced towards payment of the open account, which the plaintiffs, the present defendants, sought to recover back on the ground that the machines were worthless; the fourth, for money had and received, was to recover money paid on the notes on the ground that the machines were worthless. The defendant, the present plaintiff, did not in that action seek to avail itself of this claim, any more than those we have heretofore considered, either as a defence to

the action, or by way of set-off, recoupment, or otherwise. It offered evidence as to the items embraced in the open account, not in any way to reduce the damages or to obtain damages for them, but to show that the claims there advanced by the plaintiffs, the present defendants, were inconsistent and unjust. Under the fourth count, the plaintiffs, the present defendants, put in evidence the two payments of \$100 each, together with a claim for the proceeds of the notes delivered to the defendant, the present plaintiff, on the open account, which sums they sought to recover back on the theory that the contract had been rescinded. The judge charged the jury, that the contract had not been rescinded, and the verdict given by the jury was based upon the first count, to which, as recorded, it was strictly confined. If this was erroneous, it was a matter to be dealt with in that action, and cannot here be inquired into.

While, therefore, the plaintiffs, the present defendants, had put in evidence the payments which they had made on the open account, they recovered no judgment therefor, nor could they have done so, as the only count to which the payments were as a ground of recovery applicable was rejected by the judge, who limited them to their first count. The plaintiffs, the present defendants, would not be estopped from bringing a subsequent action to recover these payments, if otherwise they might properly do so, because of having put them in evidence in that action as a part of their damages, and they are now entitled to the benefit of them as payments on the open account. They were in no way comprehended in the verdict as found. *Anthony v. Travis*, 148 Mass. 53, 58. Evidence was also offered of these payments by the defendant, the present plaintiff, for the purpose of showing that the plaintiffs, the present defendants, had accepted the machines and made payments thereon, for which purpose it was competent. The proceedings in the former action do not, therefore, prevent recovery by the plaintiff in the case at bar upon the open account.

For these reasons, a majority of the court are of the opinion that the plaintiff is entitled to recover upon the first count the sum of \$1,846.45, with interest from February 16, 1885, as found in the alternative by the auditor, and affirmed by the presiding judge, and that the ruling which denied it the right

to recover on this count was incorrect; and on the second and third counts, as the plaintiff may elect, the aggregate on both counts not to exceed the sum of \$557.56, with interest from April 30, 1885.

New trial ordered.

S. Lincoln & E. M. Parker, for the plaintiff.

C. S. Hamlin, (M. Morton, Jr. with him,) for the defendants.

MARY DEALEY vs. WILLIAM MULLER & others.

Suffolk. March 15, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Child — Due Care.

A girl seven years of age, in crossing a city street in the daytime, was run over by a heavy wagon and injured. At the trial of an action to recover for such injuries, there was evidence that the plaintiff, a child of ordinary intelligence, lived on the southwest corner of B. Street, a much travelled highway seventy feet wide, and W. Street; that she had been sent by her mother to find her younger brother, and just afterwards was struck and run over in the easterly gutter of B. Street, a few feet north of W. Street; and that the driver of the wagon was racing his horses at the time, and crossed W. Street on the run; and further evidence justifying the inference that she found her brother in the yard of the house on the northeast corner, and was taking him home when struck. The jury took a view of the locality. *Held*, that there was evidence for the jury on the questions whether the plaintiff exercised due care in attempting to cross the street, and in avoiding being run over while so doing.

TORT for personal injuries sustained by the plaintiff by being run over by a wagon, driven by a servant of the defendants, on Beacon Street in Somerville. At the trial in the Superior Court, before *Dunbar, J.*, on the question whether the plaintiff was in the exercise of due care, evidence was introduced tending to prove the following facts.

Beacon Street is about seventy feet wide, with sidewalks ten or twelve feet in width, and many heavy teams pass over it daily, and a street railway track runs through it. The plaintiff, who at the time of the accident was seven years of age and was a child of ordinary intelligence, lived with her father in a house on

the southwest corner of Beacon Street and Washington Street, which intersects it. A grocery store and a block of tenement houses belonging to one Dewire stand on the northeast corner of these streets, and a yard is situated next north and alongside the store and block, into which the doors of the houses open, and which communicates with Beacon Street through a gate. The accident occurred on October 4, 1887, on or about five o'clock in the afternoon, at which time two heavy teams of the defendants, each consisting of a wagon weighing about eighteen hundred pounds and a pair of heavy horses, were passing through Beacon Street driven by one Flinn and one Ryan, servants of the defendants. The plaintiff on her return from school on that afternoon was sent by her mother to find her brother, a child five years old, and was engaged on that errand when she was injured.

Dewire testified, for the plaintiff, that he was in his grocery store at this time, waiting upon a customer. He saw the teams coming down Beacon Street rapidly, the horses galloping, and he thought that the teamsters were having a race. He saw them cross Washington Street, and went to the window and heard somebody halloo; he then looked out and saw Flinn's team pulled up about ten feet in advance of where a child was lying senseless in the street. He went out of his store and around the corner, and saw Flinn's team standing on the side of the street nearest the store, a short distance from the sidewalk, and about opposite his yard. Ryan's team was on the other side of the street railroad track, a little in the rear. The plaintiff was then lying on the ground, about ten feet behind Flinn's team, and about ten feet north of the northeast corner of Beacon and Washington Streets. He had not seen her before on that day, but saw her little brother running away after the accident. Shortly before this, he heard the voices of children in the yard, and knew that there were a lot of them there, but did not know who they were.

Other witnesses for the plaintiff corroborated Dewire as to the fact that Flinn was at the time driving his horses on the run, as well as in other respects, but none of them testified that they saw her between the time she started out to find her brother and the accident. Flinn and one Crosby, witnesses for

the defendants, testified that, as the team was approaching the place of the accident at a moderate pace, the plaintiff came out of Dewire's yard through the gate, chased by a child or children, and that she ran immediately under the horses' feet, and was then run over and injured. The plaintiff testified that she had no recollection of what occurred on the day of the accident. The jury took a view of the locality and surroundings.

The judge refused to rule, as requested by the defendants, that there was no evidence of due care on the part of the plaintiff which would justify a verdict in her favor, and the defendants excepted.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

The case was argued at the bar in March, 1889, and afterwards was submitted on the briefs to all the judges.

J. G. Holt, for the defendants.

C. H. Hudson & C. Abbott, for the plaintiff.

W. ALLEN, J. The plaintiff was run over in the highway by a wagon belonging to the defendants, and driven by their servant. No question was made in regard to the negligence of the defendants' servant, and the only exception argued is to the refusal of the court to rule that there was no evidence of due care on the part of the plaintiff. This is put upon the ground that the circumstances were not so fully disclosed by the evidence that the jury could properly draw any inference as to the care or negligence of the plaintiff. We think that there was evidence that rendered the question a proper one for the jury.

The plaintiff was a child seven years of age, and of ordinary intelligence, and she testified that she had no recollection of what occurred on the day she was injured. There was evidence that on her return from school, on the afternoon of that day, she was sent by her mother to find her brother, a child of five years. It was not argued that the mother was negligent in this respect. No witness on whom the plaintiff relied testified to seeing her after she left her house, and before the injury, but there was evidence of circumstances proper for the consideration of the jury upon the question of her care. The plaintiff was injured on Beacon Street in Somerville, north of its crossing with Washington Street. She lived on the southwest corner of the streets,

and she was run over in the gutter on the easterly side of Beacon Street, a few feet northerly from Washington Street, and near the northeast corner of the streets. There was evidence from which the jury might have inferred that she found her brother in a yard near where she was injured, and was taking him home at the time of the accident. To reach her house, it was necessary to cross both Beacon Street and Washington Street. Her most direct course would be to leave the sidewalk near where she was injured, and cross diagonally to her house on the opposite corner. The jury took a view of the premises, and heard other evidence concerning the character and condition and use of the streets, and it was for them to say whether the plaintiff exhibited the common prudence of a child seven years old in attempting to cross the street where she did.

The other question is, whether, if she was properly upon the street, the plaintiff used due care to avoid being run over by the defendant's team. The jury saw the place; — the street, seventy feet wide; the place in the gutter where the plaintiff was hurt, and its nearness to the sidewalk; the appearance of the surface of the street and gutter; the aspects of the street and objects in the direction from which the danger came; — they heard the evidence of the witnesses, who testified that the horses raced, on the run, across Washington Street, and that they saw the plaintiff when the wheels of the wagon had passed over her, within less than twenty feet of that street. The jury may well have found that there was no evidence of want of due care in the plaintiff, and that the danger was such that the common prudence of children of her age could not be expected to anticipate or avoid, and have inferred from all the circumstances that she was in the use of due care, as they might if she had been run over upon the sidewalk, under circumstances otherwise the same. Undoubtedly the care required of the plaintiff in the street and upon the sidewalk is not the same, but if she was rightfully in the street, the rule of proof of due care is the same.

In the opinion of a majority of the court, the ruling excepted to was correct.

Exceptions overruled.

**BOSTON RUBBER SHOE COMPANY vs. BOSTON RUBBER
COMPANY.**

Suffolk. March 18, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Corporation — Certificate of Incorporation — Commissioner of Corporations —
Corporate Name — Trade Name — Franchise.*

A certificate of incorporation, duly issued by the Secretary of the Commonwealth under the St. of 1870, c. 224, § 11, (Pub. Sts. c. 106, § 21,) is conclusive as to private persons of the right of the corporation to the corporate name inserted therein; and in bearing such name, the corporation is exercising a franchise conferred by law.

The commissioner of corporations may, under the St. of 1870, c. 224, §§ 8, 11, (Pub. Sts. c. 106, §§ 17, 21,) properly approve as the name of the corporation the name assumed in the agreement of association, although such name is already in use as a trade name by an existing corporation of a different corporate name.

A corporation with a corporate name similar to a trade name used by an older corporation, continued for ten years to exercise its franchise in a different line of the same business without mutual embarrassment, except that letters and packages intended for the latter sometimes miscarried, without however causing serious inconvenience. The younger corporation then prepared to enter the same line of business, and to use its corporate name in it in competition with the older corporation. *Held*, that no right or interest of the older corporation was injured or put in jeopardy by the exercise of a franchise, and that a petition brought by it under the Pub. Sts. c. 186, § 17, for leave to file an information in the nature of a *quo warranto*, and to restrain the younger corporation from thus using its corporate name, must be dismissed.

PETITION, under the Pub. Sts. c. 186, § 17, for leave to file an information in the nature of a *quo warranto*, and to restrain the respondent from doing business under the name of the Boston Rubber Company.

The petition, as amended, alleged that the petitioner, which was organized under the name of the Malden Manufacturing Company, was in 1855, by special statute, authorized to take the name of the "Boston Rubber Shoe Company," whereupon it assumed and had since borne that name; that in 1878 the respondent was organized under the general laws of the Commonwealth then in force relating to business corporations, and obtained a certificate of incorporation, dated August 29, 1878, from the Secretary of the Commonwealth, in the form pre-

scribed by the St. of 1870, c. 224, § 11, which certificate recited that persons named had associated themselves with the intention of forming a corporation under the name of the "Boston Rubber Company, for the purpose of manufacturing and selling articles consisting wholly or in part of india-rubber, or of its compounds, or of similar elastic or vulcanizable substances, and to further deal in all kinds of rubber goods, buying and selling, or receiving the same on commission or consignment, with a capital of forty thousand dollars, and have complied with the provisions of the statutes of this Commonwealth in such case made and provided, as appears from the certificate of the president, treasurer, and directors of said corporation, duly approved by the commissioner of corporations, and recorded in this office"; and certified that the persons named, "their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of the Boston Rubber Company, with the powers, rights, and privileges, and subject to the limitations, duties, and restrictions, which by law appertain thereto"; and that the respondent thereupon assumed and had ever since borne the name of Boston Rubber Company, in violation of the St. of 1870, c. 224, § 8, that name being the name of the petitioner, a previously existing corporation, and in use by it.

The petition further alleged, that the petitioner had done a large business in the manufacture and sale of rubber boots and shoes, and that this had been practically its sole business for the last twenty years; that now and for the past thirty years it had been extensively known to the rubber boot and shoe trade throughout the country, as well as by consumers, as the "Boston Rubber Company," and that it was constantly receiving letters, orders, checks, etc., addressed to it by that name; that the respondent since its organization had been engaged in the business of manufacturing and selling articles made from india-rubber other than boots and shoes; that the respondent, however, had recently begun to make preparations for engaging in the business of making and selling rubber boots and shoes, in addition to its other business, in which proposed business the respondent intended to use the name "Boston Rubber Company," by putting it on the printed matter used by it and by stamping it on

the boots and shoes to be manufactured by it; that hitherto letters and orders intended for the petitioner, and addressed as above recited, had frequently been first received by the respondent and opened by it, and, upon discovery of the fact that they were intended for the petitioner, had been remailed or forwarded by the respondent to it; that hitherto such confusion of letters, orders, etc. had not been of vital importance to the petitioner, because of the difference in the business of the two corporations, and the petitioner had merely remonstrated with the respondent for using a similar name, without actively opposing such use; that, however, if the respondent should enter into the same line of business as the petitioner, to wit, the making of rubber boots and shoes, as it threatened to do, this confusion of letters, orders, etc. would be of vital importance to the petitioner and to the public; and that the use of the name Boston Rubber Company by the respondent was the exercise of a franchise or privilege not conferred by law, by the exercise of which not only would confusion as to the identity of the petitioner and the respondent be created in the minds of the public, who would be misled and deceived thereby, but also the business of the petitioner would be injuriously affected, and its private right and interest injured and put in hazard.

The prayer of the petition was, that the petitioner be granted leave to file an information in the nature of a *quo warranto* against the respondent, to cause it to answer to this court by what warrant it bore the name Boston Rubber Company; and for an injunction. The respondent demurred to the petition, as setting forth "no ground upon which the relief prayed for can or ought to be given by the court." Hearing on the petition and the demurrer, before *Devens, J.*, who reserved the case for the consideration of the full court.

A. A. Ranney & W. S. Rogers, for the petitioner.

G. Putnam & W. L. Putnam, for the respondent.

W. ALLEN, J. To give the court authority to act under the Pub. Sts. c. 186, § 17, the petition must show that the respondent, in bearing the name Boston Rubber Company as its corporate name, is in the exercise of a franchise not conferred by law, and thereby injures or puts in hazard some right or interest of the petitioner.

The petition shows that the respondent was incorporated under the St. of 1870, c. 224, and a copy of a certificate in due form, as prescribed by the statute, of the incorporation of the respondent is annexed to the petition. By the terms of § 11 of the statute, this has the force and effect of a special charter, and is conclusive of the organization and establishment of the corporation.

The respondent does not contest this, but contends that the franchise to bear the corporate name is distinct from the franchise to be a corporation, and that the certificate is not conclusive as to the former, though it may be as to the latter. Without considering whether a corporation can exist under the statute without a corporate name, and whether any proceedings against it for being incorporated by a name which it had no right to assume should not be for a forfeiture of its whole franchise as unlawfully obtained, we think that the statute intended that the certificate should be conclusive of the right to the corporate name, and gave a franchise to bear the name, which can no more be impeached by private persons than can the franchise to be a corporation, and that in bearing the name the respondent was exercising a franchise conferred by law. See *Goddard v. Smithett*, 3 Gray, 116, and *Rice v. National Bank of the Commonwealth*, 126 Mass. 300.

Section 1 of the statute of 1870 provided that persons associating together by an agreement in writing, such as is described in the statute, with the intention of becoming a corporation for certain purposes, "shall become a corporation upon complying with the provisions of the eleventh section of this act." Section 7 prescribed what things the agreement should set forth; among others, the name by which the corporation should be known. Section 8 provided that "any name may be assumed for such corporation which shall indicate that it is a corporation, and which is not previously in use by an existing corporation or company, and the name assumed in the agreement of association shall not be changed but by act of the Legislature." It further provided, that, in the cases of corporations organized for certain purposes, certain words should form part of the name. Section 11 provided for a certificate of incorporation under the seal of the Commonwealth, which "shall have the force and

effect of a special charter, and be conclusive evidence of the organization and establishment of such corporation."

By earlier statutes, persons associating, by agreement in writing, for certain purposes, and complying with the provisions of the statute, could become a corporation under any name not previously in use by any other corporation or company. These statutes required that there should be an organization as a corporation, and that a sworn certificate of its officers, containing various particulars mentioned, should be published in newspapers and deposited with the Secretary of the Commonwealth. Gen. Sts. c. 61. St. 1851, c. 133.

Section 11 of the statute of 1870 was new. It provided that a sworn certificate of the officers, containing a copy of the agreement and of the record of organization, should be submitted to the commissioner of corporations for his examination, and he was authorized to require other evidence if he thought necessary. If it appeared that the requirements of the statute had been complied with, he was to certify that fact, with his approval of the certificate. The certificate, with his approval indorsed, was to be filed with the Secretary of the Commonwealth, who was to issue the certificate of incorporation in a form prescribed. He was also to make a record of the certificate, and a copy of the record was made evidence. Section 12 provided that corporations organized under former general acts, might, by complying with the provisions of the section, receive a certificate of the same effect as that provided for in § 11.

The Legislature plainly intended to require that the certificate provided for by § 11 should be procured, and that it should be a substitute for the evidence of compliance with the provisions of the statute that was required under former acts, and that in a case within the provision of the statute the certificate should be conclusive as to private persons of the right to the corporate existence by the designated corporate name.

The question whether the franchise was improperly obtained, or improvidently granted, may arise in proceedings for a forfeiture in behalf of the public, but it is not open in proceedings by a private person under the Pub. Sts. c. 186, § 17.

But the petitioner fails to show that the respondent did not conform to the statute in taking the name "Boston Rubber

Company." The only ground stated is, that the name was previously in use by the petitioner. It was not the petitioner's corporate name, and it was clearly within the authority of the commissioner to approve it. If it was within his discretion to refuse to approve it, this court cannot exercise that discretion. But the petitioner alleges that it used the name "Boston Rubber Company" before the respondent was incorporated, and that it was known in the trade by that name as well as by the name of "Boston Rubber Shoe Company." By the name previously in use by an existing corporation, the statute means the corporate name, and not another name by which the corporation may have been known. A corporation may acquire a right to the exclusive use of another name than its corporate name as a trade name, but not as a corporate name. That is prohibited by law. The object of the statute is not to prevent the fraudulent use of trade names, but to prevent the identity of corporate names. The same provision was inserted in the St. of 1872, c. 217, (Pub. Sts. c. 40, § 17,) which authorized the formation of library corporations, and is generally found in acts authorizing other than trading corporations. See Pub. Sts. c. 115, § 3.

The petition must also show that the petitioner has been injured by the exercise by the respondent of a franchise not conferred by law. The respondent has exercised the franchise for ten years, and the only injury alleged to have been received by the petitioner is the occasional delay of letters and packages addressed to the Boston Rubber Company, but intended for the petitioner. It is alleged that this has not been of vital importance, and that the petitioner contented itself with merely remonstrating, and made no active opposition. The lapse of time would be a sufficient answer if this ground were relied on. The only other injury alleged, and that upon which the petitioner relies, is the anticipated injury to its business from a proposed change in the business of the respondent. It is alleged that the business of the petitioner is the manufacture and sale of rubber boots and shoes, which it is alleged is a different business from that of the respondent; that the respondent has never engaged in that business, but is now preparing to do so, and to use its name in the business; and that it will thereby greatly injure the business of the petitioner. Passing by the objection that it

is not the actual, but the threatened use of the name, that is alleged to cause apprehension of injury and hazard to the petitioner's interest, it is obvious that this injury is not alleged to be caused by the exercise of the franchise bearing the corporate name, but by the particular manner in which the name may be used.

It is not alleged that injury arises from the existence of the corporate name, but that it will arise from the use of the name in the business of making rubber boots and shoes, in which business the petitioner alleges that it has acquired a right to the name as a trade name or trade-mark. If the respondent should not engage in that business, or should carry it on distinct from its other business, and under a trade name distinct from that of the petitioner, it is not shown that there will be any injury to the petitioner, unless what it has submitted to for ten years, from the continued use by the respondent of its corporate name. The alleged right is that acquired by the petitioner, by contract or otherwise, to prevent the respondent from engaging in the business of manufacturing rubber boots and shoes, or from using its name in that business, and the alleged injury is that the respondent intends to engage in the business, and to use its name in it in competition with and to the injury of the petitioner's business. The injury is not from using the name as a corporate name, but as a trade name.

Every act of a corporation involves the exercise of its franchise, but the statute does not give to every person injured by the breach of contract or by the wrongful act of a corporation the right to file a petition to test the validity of the franchise exercised by it. It must appear that the exercise of the franchise is itself injurious; the injury must be the direct and necessary result of the exercise of the franchise, and one to which the remedy of exclusion from the franchise is adapted. The only judgment that can be rendered against the respondent is, that it be perpetually excluded from the franchise, that is, precluded from having a corporate name. The respondent has used its corporate name for ten years, and it has caused no injury to the petitioner of which it can or seeks to avail itself in this proceeding. If the petitioner apprehends injury to its business from an anticipated new use by the respondent of its name in

a particular way against the private right of the petitioner, its remedy is to establish the right and secure commensurate remedy by suit, and not, by the extraordinary remedy provided by the statute for usurpation of a franchise, to exclude the respondent wholly from its name, on the ground that it was not conferred by law.

For these reasons, because the certificate is conclusive that the respondent's name was conferred by law, because the facts show that the name was properly approved, and because the petitioner does not show that its right or interest has been injured or put in jeopardy by the exercise of a franchise, without considering whether the allegations of the petition show any injury to any right of the petitioner, we think that the petition does not show sufficient ground for granting leave to file an information.

Petition dismissed.

BARTHOLOMEW O'DOWD vs. CITY OF BOSTON.

Suffolk. March 19, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Boston — Removal of Subordinate Employee "for Cause."

Under the St. of 1885, c. 286, § 5, providing that officers and boards of the city of Boston may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," such a subordinate may summarily be removed by them, without a hearing, upon assigning the cause thereof in the order of removal.

A subordinate employed on the East Boston ferries was discharged by the superintendent, and the board of directors subsequently passed an order reciting that "a communication from the superintendent was received that he had discharged" such person "for intoxication while on duty; on motion, the action of the superintendent was approved." *Held*, that there was a sufficient order for the removal of such subordinate.

CONTRACT. The declaration was as follows:

"And the plaintiff says: 1. This is an action of contract, brought to recover compensation for services as a deck hand on a ferry-boat in charge of the city of Boston, at the rate of sixty-five dollars per month, from October 22, 1886, to the date

of the writ. 2. On or about December 18, 1888, the plaintiff was duly appointed by the board of directors of East Boston ferries a deck hand on said ferries. 3. On the nineteenth day of October, 1886, about midnight, while the plaintiff was employed as such deck hand, he received from the superintendent of East Boston ferries the following notice: 'October 19, 1886. Bartholomew O'Dowd, Boston. Sir, You are hereby discharged from the service of the East Boston ferries. Respectfully, H. P. Arbecam, Superintendent.' 4. At a meeting of the said board of directors held on October 22, 1886, at nine o'clock A. M., the following appears as of record: 'A communication from the superintendent was received, that he had discharged, October 20, 1886, Bartholomew O'Dowd, deck hand, for intoxication while on duty. On motion, the action of the superintendent was approved.' This action of the board was communicated to the said O'Dowd, who thereupon filed with the clerk of said board, at eleven o'clock A. M. of said day, a petition in writing for a hearing before the board. 5. The board of directors of East Boston ferries is a board included under the provisions of the act of 1885, chap. 266, sect. 1. 6. Said board of directors did not give, and have never since given, the plaintiff an opportunity to appear before it to answer to the said charge of intoxication, and no order of removal of said O'Dowd was made by said board except as hereinbefore stated. 7. The defendant since said nineteenth day of October, 1886, has never tendered the plaintiff an opportunity to render services as aforesaid, and the plaintiff, although he has never offered to do so, has at all times been ready and willing to render such services, and has at times engaged in other employment. 8. And the plaintiff says the defendant owes him for services, as aforesaid, the sum of sixteen hundred and ninety dollars."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action.

The Superior Court sustained the demurrer, and ordered judgment for the defendant. The plaintiff appealed to this court.

A. J. Bailey, for the defendant.

J. M. Hall, for the plaintiff.

W. ALLEN, J. It was admitted by the defendant that the plaintiff was a subordinate legally appointed by the board of

directors of the East Boston ferries, and that the power of the board to remove its subordinates was fixed by the St. of 1885, c. 268, § 5, which provides that such board "may remove such subordinates for such cause as they may deem sufficient and shall assign in their order for removal." It insists that the declaration shows that the plaintiff was duly removed from his position as deck hand on the ferry-boat.

The plaintiff contends that no order for his removal was made by the board. The approval by the board of the action of the superintendent reported to it was a sufficient order for removal. The removal dated from the order of the board, and not from the action of the superintendent. The recital that the superintendent had reported that he had discharged the plaintiff for drunkenness was the statement of the cause of the removal which the board made by approving the action of the superintendent. Whether the order was legal and effected the removal must depend upon the validity of the other objection presented by the plaintiff, that no opportunity was given him to be heard before the order was passed. The plaintiff contends that the statute requires that a removal shall be for cause; that the statute imports that there shall be charges stating the cause of removal, and a hearing and adjudication upon them; and that the words "for cause" have acquired a technical meaning, in which it will be presumed the Legislature used them. But the words as used in the statute are connected with and qualified by other words, and whether in that connection they have the meaning contended for by the plaintiff must be determined by all the language of the statute.

One meaning which may be given the statute is, that it authorizes the board to remove for any cause which, upon hearing and adjudication, it determines to be sufficient, and which it shall assign in an order for removal; and another meaning is, that it may remove for any cause which, with or without charges or hearing, it deems sufficient, and which it shall assign in the order for removal. We think the latter is the true meaning. The language of the statute indicates that it did not intend to require charges and a hearing. It is not to be at the discretion of the board for cause shown, which might have implied that there should be a hearing and adjudication, but it is to be for

such cause as the board shall deem sufficient, and this does not seem to contemplate a formal adjudication. If it was intended that the removal was to be upon charges and an adjudication, there was no occasion to say more than that it was to be for cause, and especially none for the requirement of an order for removal in which the cause should be assigned. There must be a cause in fact for every removal, though in a removal at pleasure no cause need be given, and none can be judicially known. The intention of the statute seems to be to qualify a removal at pleasure, by requiring a record to be made of the cause. The statute applies to all the departments of the city government, and while this construction of it would not impair the vigor and efficiency of administration, its effect in discouraging dismissals for insufficient or improper causes is manifest.

The same intention appears in considering the change made in the law by the statute. Before the statute, it may be said, in general, that the dismissal of subordinates employed by the different departments and officers of the city was not regulated by statute, and that removals from office regulated by different statutes were generally at pleasure. As is correctly said in the plaintiff's brief, "It would seem that it had been the policy of the law to allow perfect freedom of removal as an incident of the appointing power, except in a few cases where certain emoluments went with the office, or where for other reasons a more fixed tenure was found necessary." The statute in question, amending the city charter, besides giving to the mayor the appointment of city boards and officers which had been elected by the city council or board of aldermen, and giving to boards and officers the appointment of their subordinates, made several important changes in the power of removal. It enlarged the scope of former statutes by regulating the removal of subordinates — which word the city ordinances declare includes employees and laborers (Revised Ordinances of 1885, c. 4, § 19) — appointed by boards and officers; it made the mayor the appointing power, and the different boards and officers the removing power; it fixed one uniform rule in regard to all officers appointed by the mayor, and all subordinates appointed by the different boards and officers, which was that they might be removed for such causes as were deemed sufficient by the

removing power, and as should be assigned in the order for removal. The statute certainly does not prohibit a hearing before removal, nor limit the discretion of the removing power to give a hearing; but the question is whether it makes a hearing a necessary condition of a removal.

In adopting a new rule applicable to all cases, we do not think that the language of the statute indicates an intention to adopt the former rule of removal at pleasure, or the former exception to it of a technical removal for cause, but to allow summary removals without hearing, with the condition that the cause of the removal should be put on record. This would naturally have an effect to prevent improper removals, and, in case of a removal for a cause for which it could not lawfully be made, would make redress possible, giving to the person removed the same remedy he would have had if the removal had been for satisfactory cause found after a hearing. It may be doubted whether there would be much benefit to either officers or subordinates in a compulsory hearing before an absolute power, which would not voluntarily give a hearing when justice required it. With or without a hearing, there is a record of the cause of removal, and the appeal in either case is to public opinion. We cannot find in the language or reason of the statute the intention to establish the rule that officers and employees of the city should be removed or discharged only after charges made and a trial had upon them.

Judgment for the defendant affirmed.

ELIZABETH R. LEE vs. HENRY S. WHITNEY.

Suffolk. March 19, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Promissory Note — Fraud — Knowledge.

The pledgee of shares of stock as collateral security for the performance of a guaranty, having reason to suspect that the certificate had been fraudulently raised by the pledgor, asked him for further security, and received as such his promissory note before its maturity and bearing another's indorsement. *Held,*

that, if the pledgee took the note in good faith, and without any knowledge that the indorsement was obtained by the pledgor through a fraudulent suppression of the truth as to the certificate, a failure on his part to make inquiries would not preclude him from recovering on the note.

CONTRACT upon a promissory note for \$3,500, signed by Frank H. Williams, dated December 12, 1887, and payable one month after date to the order of Henry S. Whitney, and indorsed by him. Trial in the Superior Court, before *Dunbar, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions, which, so far as material, appears in the opinion.

F. D. Allen, for the defendant.

J. W. Pickering, for the plaintiff.

FIELD, J. The defendant's case, as stated in the bill of exceptions, is, that the plaintiff bought of Williams, for \$3,000, two hundred shares of the stock of the Campbell Engine Company, and received from him a written agreement "guaranteeing her against loss upon the investment," and as collateral security for the performance of this agreement she also received from him "a certificate of preferred stock in the Rutland Railroad Company, purporting to be for one hundred shares, but which there was evidence tending to show had been fraudulently raised"; and that one Abbott, the attorney of the plaintiff, discovering or believing that the certificate had been raised from one share to one hundred shares, "went to Williams and demanded additional security, and got this note in suit." The note is for \$3,500, signed by Williams, payable one month after date to the order of the defendant, and indorsed by him. The defendant indorsed it at the request of Williams, and for his accommodation.

The bill of exceptions states that "the defendant resisted payment on the ground, among others, that his indorsement had been obtained from him through the false and fraudulent suppression by Williams, made with the plaintiff's knowledge, of the fact that Williams had criminally raised from one to one hundred shares" this certificate of stock, for which the note in suit was intended by Williams and the plaintiff to be, and actually was, substituted. The court instructed the jury, that if Williams obtained the defendant's indorsement "through the fraudulent suppression of the truth as to the certificate, and

that the plaintiff or her agent knew of this fraud at the time they accepted the note, that would be a bar to the plaintiff's recovery." The court refused to give an instruction that knowledge on the part of the plaintiff, or her agent, "of the crime Williams had committed in raising the certificate was of itself sufficient to put them upon their inquiry, and if with such knowledge they remained silent, and made no inquiry either of Williams or of the defendant, they must be presumed to have known and assented to Williams's fraud"; and instructed the jury that "the plaintiff would not lose her right to recover by mere carelessness, or the failure to make such inquiries as would seem to the jury prudent. There might be, however, such recklessness as would be inconsistent with honesty of purpose and good faith. And you may consider the point raised in the prayer, in connection with all the circumstances of the purchase, in passing upon the true issue, which is this, whether the plaintiff in fact purchased without knowledge of any infirmity in the note and in good faith."

It was not disputed that the plaintiff took the note before its maturity, and as collateral security for the agreement. The instruction, that, if Williams fraudulently suppressed the truth in regard to the certificate of stock when he asked the defendant to indorse the note for his accommodation, and that if the plaintiff, or her agent, knew of this when the plaintiff took the note, these facts would avoid the note, was sufficiently favorable to the defendant. This instruction having been given, as the plaintiff took the note for value before maturity, the only question was whether she took it in good faith, and without notice or knowledge of this fraudulent suppression of the truth, and upon this question the instructions were correct. *Smith v. Livingston*, 111 Mass. 342. *Freeman's National Bank v. Savery*, 127 Mass. 75, 79.

Exceptions overruled.

JOHN MCINTIRE vs. JOHN H. ROBERTS & another.

Suffolk. March 19, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Personal Injuries — Unguarded Elevator Well near Street.

An elevator well, in a building bounding on a city street, communicated directly with the sidewalk through an opening five or six feet wide and about ten feet high in the front wall. The sill of this opening was a stone eighteen inches wide, which did not project beyond the wall, and was raised about three inches above the level of the sidewalk. While the elevator was being used in hoisting goods unloaded from a wagon standing in the street, the horse attached to the wagon backed it upon the sidewalk, causing travellers thereon to jostle and push one of their number through this opening, then unguarded, into the well, occasioning him injuries. *Held*, that the occupier of the building was not liable for such injuries.

The St. of 1886, c. 874, § 108, providing for the guarding of elevator openings in the floors of any building in Boston, in which there was an elevator not running in a shaft, was *held* not to apply to elevator openings through the wall of such a building into a street.

TORT for personal injuries occasioned to the plaintiff by falling down an unguarded elevator well in a building on Merrimack Street, a highway in Boston. Writ dated December 7, 1887. Trial in the Superior Court, before *Sherman*, J., who ordered a verdict for the defendants, and reported the case for the determination of this court, in substance as follows.

There was evidence tending to prove the following facts. The defendants had occupied the building in question for several years. The elevator well, in which ran a freight elevator used by the defendants in their business, was in the front part of the building. An entrance was afforded to this well directly from the street and across the sidewalk through an opening five or six feet wide and about ten feet high cut through the front wall of the building. The base or sill of this opening was formed by a stone about eighteen inches in width, which sill did not project beyond the front line of the building, and was raised about three inches above the surface of the sidewalk. On each side of this opening, about two feet and ten inches above the surface of the sill, there was a notch in the wall to support a bar to protect persons on the sidewalk from falling into the

well. On August 26, 1887, about five o'clock in the afternoon, the sidewalk in front of the building was obstructed by men engaged in unloading iron castings from a wagon backed up against the curbstone, and in carrying them across the sidewalk and piling them against the building preparatory to placing them through this opening upon the freight elevator. The plaintiff, who was sixty-two years of age and lived in the vicinity, was at the time passing along Merrimack Street on his way to his home. When the wagon was unloaded, he proceeded to pass by on the sidewalk, and was opposite the opening, which was then unguarded by the bar, when the horse attached to the wagon suddenly backed the wagon upon the sidewalk, forcing against him the persons upon the sidewalk between himself and the wagon, and these persons pushed him towards the defendant's building. The plaintiff's feet struck against the stone sill of the opening, and he fell down the well into the defendants' cellar, sustaining the injuries.

The plaintiff put in evidence the St. of 1885, c. 374, § 108, relating to the protection of elevator openings in the city of Boston. The evidence tended to show that the elevator did not run in a shaft. The jury took a view of the premises.

At the request of the defendants, the judge ruled that, on the evidence, the plaintiff was not entitled to recover, directed a verdict for the defendants, and reported the case for the determination of this court. If the ruling was correct, the verdict was to stand; otherwise, a new trial was to be ordered.

J. A. Maxwell & J. D. McLaughlin, for the plaintiff.

A. Hemenway, for the defendants.

FIELD, J. It is plain that the opening in the wall of the building for access to the elevator from the street was outside the limits of the street, and that the plaintiff did not enter the building by any invitation of the defendants. The contention is that the defendants were negligent in leaving this opening unguarded.

It is said of the liability of the city in *Alger v. Lowell*, 3 Allen, 402, 405: "The place where the plaintiff fell was indeed outside of the line of the street; but the defect in the street which occasioned the injury was the want of a railing, if one was necessary at that place to make the street safe and convenient for

travellers in the use of ordinary care. And the city would have an undoubted right to erect such a railing, although it might obstruct the entrance to the passageway of an abutter; because no person has a right to an open access to his land, adjoining a street, of such a character as to endanger persons lawfully using the street for purposes of travel."

In *Franklin v. Fisk*, 13 Allen, 211, it is said: "When highways are established, they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travellers, and to use them for public travel, does not extend beyond the limits of the location. . . . The right of adjoining proprietors to erect structures upon their land up to the line of the highway is exercised everywhere." See *Mayo v. Springfield*, 186 Mass. 10.

If this elevator opening rendered the sidewalk permanently dangerous to travellers, it was undoubtedly the duty of the city of Boston to put up a barrier, and if the defendants removed it they might be liable to travellers who were injured in consequence of its removal; but it has not yet been decided in this Commonwealth that at common law abutters are liable to travellers for injuries received in consequence of excavations made in their land outside the limits of a highway, and *Howland v. Vincent*, 10 Met. 371, is a stronger case for the plaintiff than the case at bar. It is argued that that case is opposed to the weight of authority elsewhere, and that a hole outside the limits of a highway, yet so near to it as to make the highway unsafe for travellers, constitutes a public nuisance, and that if a person creates a public nuisance he is liable to individuals for any special damage suffered therefrom. See *Barnes v. Ward*, 9 C. B. 392; *Fisher v. Prowse*, 2 B. & S. 770; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Beck v. Carter*, 68 N. Y. 283; *Bond v. Smith*, 44 Hun, 219; *Murray v. McShane*, 52 Md. 217; *State v. Society for establishing Useful Manufactures*, 13 Vroom, 504; *Haughey v. Hart*, 62 Iowa, 96.

The occupier of a building who negligently permits a private way leading to it, which is under his control, to be in an unsafe condition by reason of an excavation or embankment so near to it as to make travelling on it dangerous, is liable for injuries

received by any person who is lawfully using the way with due care. *Mellen v. Morrill*, 126 Mass. 545. *Oliver v. Worcester*, 102 Mass. 489. But abutters on a public way have not control of the way, nor do travellers use a public way by invitation of the abutters.

In this Commonwealth the obligation of a city or town to put up guards against pitfalls which are so near to a highway as to make it unsafe for travellers, is similar to the obligation which it seems is imposed upon abutters by the English law. We are not aware that it has ever been decided here, that excavations made by the owner of land outside the limits of a highway, but so near to it as to make it unsafe for travellers, constitute a public nuisance, for creating or maintaining which the landowner may be punished; or that, in assessing damages for land taken for a highway, any allowance is made to the landowner for the loss of any right to use the land not taken, in the same manner as if a highway had not been laid out. If it be assumed that, when a building abuts upon a street, it is for the authorities of the city or town to determine whether the entrances into the building from the street are so constructed that they may be permitted to remain, — and if it be also assumed that, when entrances are permitted which are constructed so as to be closed when not in use by doors or some other barrier, the occupier of the building is liable in damages to travellers upon the street if the doors are negligently left open or the barrier left down whereby the street becomes unsafe and the travellers are injured, — still we are of opinion that the facts stated in the report do not show, or tend to show, negligence on the part of the defendants. It does not appear that the opening was not constructed so as to be closed with doors, or by a proper barrier, when the elevator was not in use. The stone sill was about three inches above the sidewalk; the opening was but five or six feet wide, and nearly at a right angle with the line of the sidewalk, and the wall of the building was about eighteen inches thick. It was impossible that any traveller using due care in the day time should mistake the opening for a continuation of the sidewalk. The only danger was that a person on the sidewalk might be pushed into the opening, as he might be pushed against the wall of the building, or against or through a window, or against a door. The elevator

at the time of the accident was in use for carrying up the iron castings which were being unloaded from the wagon which had been backed up against the curbstone of the sidewalk. The accident that happened was one that could not reasonably have been anticipated, unless the horse was vicious, or there was negligence in managing him, and it does not appear that the horse belonged to the defendants, or that the persons who were unloading the castings or were in control of the horse were servants of the defendants.

There was at the time of the accident no statute which prescribed the manner in which this opening should be constructed or guarded, for the St. of 1885, c. 374, § 108, does not apply to elevator openings through the wall of a building into a street, and the St. of 1888, c. 367, § 3, had not then been passed. By the terms of the report the *Verdict is to stand.*

**THOMAS CLEGG vs. BOSTON STORAGE WAREHOUSE
COMPANY.**

Suffolk. March 19, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Conversion — Warehouseman — Delivery to Officer for Attachment.

A warehouseman, who unlocks the door of a compartment in his warehouse upon the demand of an officer with a writ of attachment, and exposes another's goods stored therein, which are thereupon attached by the officer, is not liable for a conversion of the goods.

W. ALLEN, J. This is an action of tort against a warehouseman for the conversion of goods that belonged to the plaintiff, which were put in storage by him with the defendant. While, in the defendant's warehouse, the goods were attached on a writ against a former owner of them as his property, and continued in the possession of the attaching officer under the attachment until they were replevied by another claimant. The conversion relied on is the delivery of the goods by the defendant to the attaching officer. It is conceded that the officer had no author-

ity to attach them, and the question presented is, whether the facts stated show such delivery of the goods by the defendant as will constitute a conversion of them.

The goods were stored by the defendant in its warehouse, in a locked compartment, to which the defendant held the key. The attaching officer went to the warehouse with a writ of attachment against one Preston, and demanded access to the goods in order to attach them on the writ, declaring that they were the property of Preston. The defendant opened the door of the compartment where the goods were, and the officer took them on the writ. All the defendant knew in regard to the ownership of the goods was that they had that day been delivered at the warehouse by a teamster, who ordered them to be stored in the name of Thomas Clegg, and there is nothing to show want of good faith or of due care on the part of the defendant, except the fact that it opened the door on the demand of the officer. The plaintiff relies on the rule that delivery of goods by a warehouseman to a person not authorized to receive them is a conversion. See *Lichtenhein v. Boston & Providence Railroad*, 11 Cush. 70; *Hall v. Boston & Worcester Railroad*, 14 Allen, 439. It may be assumed that it is not necessary that there should be a manual delivery of the goods by the warehouseman, but that it is sufficient if they are taken from his possession by his permission, — if he voluntarily surrenders the possession of them.

In the case at bar, there was no actual delivery of the goods by the defendant, and the facts show that the taking was not by its permission, and that it did not voluntarily surrender the possession. If the goods had been taken by a stranger, under a claim of title, in the presence of the defendant's agents, without objection, the defendant might have been held to have permitted the taking; but it cannot be contended that a taking by legal process, by an officer of the law, into the custody of the law, was by the permission of the defendant, nor that the failure to resist or impede the officer was a voluntary surrender of the possession of the goods to him. It is true that the officer was liable as a trespasser to the owner of the goods, but it would not be on that account less true that he took them by virtue of his process, and not by the permission of the defendant, nor that the defendant, if it surrendered the possession to the

officer, did it in submission to legal process, and not voluntarily. *Stiles v. Davis*, 1 Black, 101. In *Edwards v. White Line Transit Co.* 104 Mass. 159, in which it was held that a common carrier was liable on his contract as carrier for the failure to deliver goods that were taken from him under an attachment against a person not their owner, it is said, "In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use."

The fact that the defendant exposed the goods to the officer, on his demand, does not show that the taking by him was by the permission or connivance of the defendant. The officer had a writ which authorized him to take the goods of Preston, and to break open doors for that purpose; he asserted his right, and declared his purpose to attach such goods in the warehouse in the defendant's possession as belonged to Preston, and demanded access to them. The defendant did not know whether the goods belonged to Preston or to the person in whose name they were stored, but that is immaterial. It was under no obligation if it had the right, and it had no power, to prevent the opening of the door and the taking of the goods by the officer. The facts that it opened the door with the key which was the only means of opening it without breaking, that it did not oppose or impede the officer in finding and taking the goods, or even that, on the demand of the officer, it pointed out to him the particular goods he was in search of, do not show any intention to give permission to the officer to take the goods, but submission to the legal process, and to the authority claimed and exercised by the officer under it.

The fact, that, while the goods were in the possession of the officer under the attachment, he did not remove them from the defendant's warehouse, but stored them there in charge of a keeper, and paid storage therefor to the defendant, does not show a conversion of the goods by the defendant.

On all the facts, we see no ground on which the defendant can be held liable.

Judgment affirmed.

E. M. Johnson, for the plaintiff.

F. L. Hayes, for the defendant.

SARAH E. ALDRICH vs. MERCANTILE MUTUAL ACCIDENT ASSOCIATION.

Suffolk. March 22, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Beneficiary Association — Classification of Risks — "Spare Conductor" — Extrinsic Evidence.

A certificate of membership in a beneficiary association described the assured, who was killed while acting as a railroad brakeman, as a "spare conductor," and provided that, if he should be injured while engaged in an occupation more hazardous than his regular employment, the indemnity to be paid in case of death should be that fixed for the more hazardous employment. The association classified the employment of brakeman as more hazardous than that of conductor, and fixed an indemnity for each, but did not classify or fix an indemnity for that of "spare conductor." *Held*, that the beneficiary under the certificate was only entitled to the indemnity allotted a brakeman.

Evidence that the duties of a spare conductor included those of a brakeman as well as of a conductor was *held*, in an action upon such certificate, to be improperly admitted.

CONTRACT to recover \$3,000 on a certificate of membership in the defendant association, issued to John A. Aldrich, for the benefit of his wife, Sarah E. Aldrich. Trial in the Superior Court, before *Blodgett, J.*, who, after a verdict for the plaintiff, reported the case for the determination of this court. The material facts appear in the opinion.

J. H. Benton, Jr. & A. A. Maxwell, for the plaintiff.

E. Avery & A. E. Avery, for the defendant.

DEVENS, J. The certificate of membership in the defendant association permitted an employment different from that designated as the regular or usual employment of the assured in his application and in the certificate. If injured while thus engaged, temporarily or otherwise, in an employment classified by the association as more hazardous than the one thus stated as the regular employment of the insured, the indemnity to be paid in case of death was to be at the rate specified for the occupation in which he was at the time of the injury actually engaged. In his application, the insured, who was in the employment of a railroad company, had been asked to state his "Occupations: if more than one, state them all, — state your duties." His answer

was, "Spare conductor, through freight," and he was so described in the certificate. The defendant classified the several employments of conductor, baggage master, and brakeman at different rates, that of brakeman being classified as more hazardous than that of baggage master, and entitling the beneficiary under the certificate to \$250 in case of the death of the member, that of baggage master as more hazardous than that of conductor, and entitling the beneficiary to \$1,250, while the beneficiary under a certificate of conductor would be entitled to \$2,000. The court below ordered a verdict for the sum last named, and interest. The association had not classified the occupation of a "spare conductor," nor determined what indemnity the death of a member while engaged in that occupation should entitle the beneficiary to receive.

Aldrich, the holder of the certificate, was killed while performing the duties and doing the work of a brakeman on a mixed or through freight train, under the direction of another person as conductor, and the plaintiff offered evidence, which was admitted against the objection of the defendant, that "the duties of a spare conductor upon the railroad upon which said Aldrich was employed were to do anything and go anywhere on any train, at any time, and in any capacity"; that Aldrich sometimes ran the freight train as conductor, sometimes acted as baggage master, sometimes as brakeman, his duties depending on what was assigned to him, he being expected to do whatever was assigned to him. The plaintiff was thus allowed to prove that the occupation of "spare conductor" upon the road on which he was engaged was a composite employment, embracing every variety of the work of those engaged in running a train, except perhaps that of the engineer. It is therefore contended that Aldrich was legitimately within his duty as a spare conductor when killed, although actually doing the work and incurring the hazards of a brakeman.

No general use of the term in this sense was shown, nor did it appear that the defendant had any knowledge that it was so used upon the road where Aldrich was employed. *Scudder v. Bradbury*, 106 Mass. 422. The defendant must, therefore, have insured him according to the meaning of those words as ordinarily understood. When insured as a conductor on a freight

train, it was to be inferred that his duties were those of a conductor. The adjective "spare," in its ordinary lexical sense, would mean "supernumerary," or "held in reserve, to be used in an emergency." See Worcester's Dict. and Webster's Dict., *Spare*. It would properly distinguish one occasionally employed from one regularly and continuously employed. The word gave no intimation that he was engaged or desired to be insured in the performance of any other duties than those of a conductor. When words having an established place in the language are employed, and apparently used in no technical or peculiar sense, they must be construed according to their use as established. *Odiorne v. New England Ins. Co.* 101 Mass. 551. The defendant was not obliged to inquire what sense the applicant attributed to the word "spare" in the connection in which he used it. He should have defined it if that sense was unusual. Where there had been a classification of the various employments in which the insured was engaged, the defendant could not suppose that he sought to be insured except as a conductor, or that by this word he sought to embrace those otherwise distinct employments.

The insured having been actually engaged as brakeman when he was killed, the beneficiary is therefore entitled to recover only the sum of \$250. *Judgment accordingly.*

GILES LITHOGRAPHIC AND LIBERTY PRINTING COMPANY
vs. CALEB CHASE & another.

Suffolk. March 22, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Contract — Acceptance — Waiver.

A contract for printing business cards for a firm was made subject to its acceptance of a "finished proof." The printer sent a proof to the firm, which it examined and approved, and returned with directions to print. After the cards were printed a material misprint was discovered, which both the printer and the firm had overlooked in the proof, and thereupon the firm refused to receive the cards. *Held*, that the firm must be taken to have ordered cards corresponding to the proof, and that it was liable for the price.

CONTRACT to recover the price of printing five hundred thousand advertising cards for the defendants. Trial in the Superior Court, without a jury, before *Lathrop, J.*, who found for the plaintiff, and reported the case for the determination of this court, in substance as follows.

The plaintiff is a New York corporation doing business in the city of New York. The defendants are copartners, doing business in Boston under the firm name of Chase and Sanborn. In July, 1887, one Power, an agent of the plaintiff, solicited an order from the defendants to lithograph for them a million of advertising cards, at the price of two dollars per thousand. Each card was to have a picture on one side, and an advertisement of the defendants on the other, and was to be printed from manuscript to be furnished by the defendants. On July 11, 1887, the plaintiff wrote to the defendants acknowledging the receipt of the order. On July 13, the defendants wrote to the plaintiff as follows: "In reply to yours of the 11th inst., would say that the order given Mr. Power was conditional, one of the conditions being that the order was subject to our acceptance of a finished proof, at which time the order was to be given in regular form. We write you this that there may be no misunderstanding in regard to the same." The plaintiff replied to this letter on July 15, 1887: "Replying to your favor of the 13th inst., will say that your order given conditional to the satisfactory proof was regular, as that is applied to all orders given in lithography." This was all the correspondence between the parties at that time. On October 13, 1887, the number of cards to be printed was changed by mutual consent from one million to five hundred thousand.

Subsequently the defendants sent the following manuscript to the plaintiff: "There is no finer coffee in the world than the Java and Mocha imported, roasted, and packed in 2 lb. air-tight tin cans by Chase and Sanborn, Boston, Mass. A perfect blend of Private Plantation Java and Arabian Mocha, elegant in flavor and rich in strength. Beware of imitations, none genuine without our trade-mark and signature. Always packed in 2 lb. tin cans, never sold in bulk. Insist upon having this brand." Through the negligence of the plaintiff, the words in the manuscript, "Private Plantation Java and Arabian Mocha," were so

set up as to read "Private Plantation and Java Arabian Mocha." The proof-reader of the plaintiff negligently overlooked this error, and a proof was sent to the defendants, corresponding with the manuscript copy furnished by them except that the word "Java" and the word "and" were transposed as above shown. The defendants examined the proof, but through negligence did not discover the mistake, marked the proof "O. K.," and returned it to the plaintiff, directing it to go ahead and print. By so marking the proof, the defendants intended to signify their approval of it. The plaintiff, on receiving the proof so marked, printed by lithography five hundred thousand cards. When the cards were ready for delivery, the plaintiff wrote to the defendants notifying them of the fact, and requesting shipping directions. The defendants thereupon requested that a few cards should be sent to them. This was done, and the defendants then for the first time discovered the mistake, and refused to receive the rest of the cards, and tendered back those which they had received. The plaintiff duly tendered the rest of the cards, and demanded payment according to the contract.

The defendants contended that they were entitled to a "finished proof" of the card, and that they did not receive it until they received the finished cards above referred to. The plaintiff contended that the defendants were entitled only to a "satisfactory proof." The judge found that, although the proof sent was not technically a "finished proof," the defendants accepted it as a compliance with the contract.

On these facts, the defendants asked the judge to rule that, under the pleadings, the plaintiff was not entitled to recover. The judge declined so to rule, found for the plaintiff, and reported the case for the determination of this court. If on the facts found the ruling was wrong, judgment was to be entered for the defendants, or a new trial was to be granted, as law and justice might require; otherwise, judgment was to be entered for the plaintiff upon the finding.

W. B. French, for the defendant.

F. W. Proctor, for the plaintiff.

W. ALLEN, J. This is an action of contract to recover the price of printing advertising cards for the defendants. The

defendants gave to one Power, a soliciting agent of the plaintiff, an order for the printing of one million cards, at two dollars a thousand, from manuscript to be furnished by the defendants. The defendants afterwards wrote to the plaintiff as follows: "In reply to yours of the 11th inst., would say that the order given to Mr. Power was conditional, one of the conditions being that the order was subject to our acceptance of a finished proof, at which time the order was to be given in regular form. We write you this that there may be no misunderstanding in regard to the same." The plaintiff replied, "Will say that your order given conditional to the satisfactory proof was regular, as that is applied to all orders given in lithography." The defendants subsequently sent to the plaintiff the manuscript to be printed, and the plaintiff put it in print and sent a proof to the defendants, which was examined and returned by them to the plaintiff, marked "O. K.," to signify their approval of it, with directions to "go ahead and print." The plaintiff accordingly printed the whole number of cards ordered, and after they were printed, the defendants discovered that a material misprint had been made by transposing two words, so that the proof of the printed cards differed materially in meaning from the manuscript. The defendants refused to receive the cards. The plaintiff tendered them, and demanded payment.

The report finds that both parties were negligent in not discovering the mistake, and that the plaintiff was negligent in making it, but that finding does not seem to be material. We think that the contract of the plaintiff was to furnish cards according to the finished proof. The plaintiff was to put the manuscript in print, and submit a proof to the defendant, but the order for printing the cards was not to be given until the proof was accepted. The plaintiff was to furnish a sample of the printed card, and, if it was satisfactory, the defendants were to order the cards according to the sample. If there was an error in the sample, the defendants were not obliged to accept it; but if they accepted it, and ordered the cards to be furnished, they must be taken, by the construction of the agreement, to have ordered cards corresponding to the sample.

Judgment for the plaintiff on the finding.

MILTON L. EDDY vs. LUCIUS P. COFFIN.

Suffolk. March 25, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Use and Occupation — Recoupment — Evidence — Record — Landlord
and Tenant Process — Res inter Alios.*

In an action for use and occupation the tenant cannot recoup the expense of moving from the premises during his tenancy because of an alleged breach of the landlord's agreement, if he would have been put to the same expense at the end of his tenancy.

In such an action the defendant cannot put in evidence the record of a judgment in a landlord and tenant process by a third person against the plaintiff, if no execution has issued thereon, and the defendant has received no notice and has not attorned to such third person, but has held under the plaintiff undisturbed until the end of his tenancy.

CONTRACT on an account annexed. One item of the account was as follows: "Sept. 15. To use and occupation of room in building No. 81 South Street in city of Boston, from July 1 to September 15, 1887, at \$30 per month, \$75." Answer, a general denial, and that the plaintiff and the defendant had made an agreement, by the terms of which the plaintiff was to let to the defendant a room at 81 South Street, furnish to him steam power to run his machinery, and to permit the use of an elevator, all for thirty dollars per month; that during the month of July, 1887, the plaintiff ceased to furnish the steam power as agreed, and by reason thereof the defendant was obliged to move elsewhere in order to obtain the necessary steam power to carry out contracts which he then had on hand; and that the defendant was entitled to recoup damages by reason of the alleged breach of the agreement by the plaintiff.

At the trial in the Superior Court, before *Dunbar, J.*, the defendant offered evidence of the agreement and the breach thereof, which was contradicted by the plaintiff; and the defendant testified that for moving his machinery he was obliged to pay a teamster the sum of twenty-seven dollars and sixteen cents. The judge instructed the jury to disregard the evidence as to the cost of moving, and instructed them that the defendant was

not entitled to recoup therefor. To these instructions the defendant excepted. The defendant further offered in evidence the record of a landlord and tenant process brought in the Municipal Court of the city of Boston against the present plaintiff, by writ dated August 12, 1887, for the possession of the premises in question. The record of that suit showed a judgment in favor of the plaintiff therein, but did not show that execution had ever issued thereon. The judge excluded this evidence, and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

P. H. Hutchinson, for the plaintiff.

C. H. Sprague, for the defendant.

HOLMES, J. Whether the defendant moved in July or in September, he would have had to pay the cost of moving his machinery. Therefore he cannot attribute that payment to the plaintiff's breach of contract, if there was one, in failing to furnish steam, and thus obliging him to go elsewhere before the end of his tenancy. The instruction that the defendant could not recoup for this item was correct.

The record of the recovery in the summary process by a third person against the plaintiff was rightly excluded. No execution had issued upon the judgment in that suit. The judgment alone did not disseise the plaintiff of the reversion. Indeed, so far as appears, it may not have been rendered until after the defendant's term. As an adjudication of facts it was *res inter alios*. If it had not been *res inter alios*, it would not have shown that the plaintiff's title had terminated after the beginning of the defendant's tenancy at will. If the plaintiff's title did terminate, the defendant received no notice from the owner of the reversion, and did not attorn to him. The defendant held under the plaintiff undisturbed until the end of his tenancy, and must pay him. See *Coburn v. Palmer*, 8 Cush. 124.

Exceptions overruled.

ORSAMUS NUTE vs. BOSTON CO-OPERATIVE BUILDING
COMPANY.

Suffolk. March 25, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Private Way — Sidewalk.

The St. of 1849, c. 183, providing that, upon the opening of a street in Boston by private landowners for the use of the public, the owners of lots abutting thereon must, before its legal acceptance and laying out, construct convenient sidewalks on each side of such street at their own expense, "in such manner as the safety and convenience of the public shall, in the opinion of the mayor and aldermen of said city, require," was *held*, in the absence of such a requirement, not to impose upon an abutter on a private way so opened in that city any duty to build and maintain a sidewalk in the way in front of his premises, nor even to authorize him to do so.

An abutter upon such a way was *held*, independently of that statute, to have no right so to construct such a sidewalk as sensibly to interfere with the use and enjoyment of the passageway by another abutter upon the opposite side of the way.

BILL IN EQUITY, filed June 15, 1888, for the removal of a sidewalk in Andrew Place in Boston. Hearing before *Devens, J.*, who reported the case for the consideration of the full court, in substance as follows.

On July 24, 1868, the city of Boston was the owner of a tract of land between Canton Street, now called East Canton Street, and Dedham Street, now called East Dedham Street, and on that day the committee on public lands of the city council, whose powers and duties were derived from a city ordinance relating to the public lands dated May 3, 1864,* voted "that

* This ordinance, so far as material, was as follows :

"Section 1. In the month of January of each year, there shall be appointed a joint committee of the city council, to be called the committee on public lands, consisting of such numbers from each board as the city council may from time to time order.

"Section 2. The committee shall have the care and management of the public lands belonging to the city, so far as relates to the improvement, sale, and disposal of the same, subject to the approval of the mayor, and subject also to the limitations mentioned in this and other ordinances of the city,

a passageway sixteen feet in width be laid out between Canton and Dedham Streets, so as to make the lots ninety-two feet in depth." This action of the committee was approved by the mayor, but there was no evidence that it was ever approved by the board of aldermen. This passageway was afterwards laid out of the requisite width, and was called Andrew Place, and the city posted and maintained at each end of it the following notice: "This is a private way. Dangerous passing."

The plaintiff was the owner of land fronting on East Dedham Street and the defendant of land on East Canton Street, both deriving title from the city of Boston by deeds describing the premises granted to each as bounded in the rear "by a passageway sixteen feet wide," which was Andrew Place. The plaintiff, who was a teamster and owned various carts and wagons, including caravans so called, bought his land in 1874, and built on it a stable with entrances from East Dedham Street and Andrew Place. The defendant had erected on its land blocks of tenement houses which contained thirty-four houses, seven of which fronted on Andrew Place and had no other entrance, and all of which communicated with it, either directly or through back yards.

The defendant had built and continued to maintain a brick sidewalk four feet wide along its whole line on Andrew Place, except at a cross street, and had erected posts in the sidewalk at intervals, and located eight inches or more from its outer edge. It was admitted that, if the defendant had a right to maintain any sidewalk in Andrew Place, the existing structure was a reasonable one. Andrew Place is a thoroughfare considerably used by various teams and vehicles, both calling at the defendant's houses and passing through, including ice, milk, and city carts, grocer wagons, and lumber teams, none of which have been obstructed by the defendant's sidewalk.

The plaintiff introduced evidence tending to show that he was

and to such rules, orders, and regulations as the city council may from time to time adopt.

"Section 8. The said committee are authorized to lay out and make such streets, passageways, and squares on the public lands, to lay such sewers therein, and to make such alterations in the lots, as they may deem expedient, subject to the approval of the board of aldermen."

unable to drive his wagons, including water carts and caravans, out of the door of his stable on Andrew Place, and turn them so as to go out over it, without unhitching the horses and lifting the pole over a post in the sidewalk opposite his stable door, and swinging it around and then attaching the horses again; and that sometimes he had to do this a second time in order to get by another post about ten feet farther along; and that before the building of the sidewalk he had no difficulty in getting out. The plaintiff testified that he and others had used the passageway since 1867 without objection, although he owned no land abutting on Andrew Place before 1874; that a space of sixteen feet was necessary to turn round a corner with a water cart, and that he could not turn to any advantage in a passageway less than sixteen feet wide; that his water carts were about ten feet long, and his caravans twenty feet or more, all exclusive of the poles, which were nine feet long. There was also evidence tending to show loss of time and pecuniary damage by reason of such delay.

The defendant offered in evidence the St. of 1849, c. 133, and contended that under that statute it was its duty to maintain a sidewalk in Andrew Place; and also that, independently of the statute, the building and maintaining of its sidewalk was a reasonable and proper use of the way which it had a right to make.

If the defendant was entitled to maintain the sidewalk, the bill was to be dismissed, with costs; otherwise, a decree was to be entered for its removal, the damages of the plaintiff, if he was entitled to recover any, to be assessed by a master.

S. W. Harmon, for the plaintiff.

R. Gray, (*H. W. Swift* with him,) for the defendant.

DEVENS, J. The plaintiff owns the land on one side, and the defendant on the other side, of a passageway in the city of Boston, commonly known as Andrew Place. Both parties derive their title from the city, and have a title in fee to the centre of the passageway, and a right of way through its whole length. *Tobey v. Taunton*, 119 Mass. 404. *Gould v. Eastern Railroad*, 142 Mass. 85. The city was formerly the owner of a large tract of land which included these parcels, and on July 24, 1868, before the parties acquired their titles, the committee on public lands of

the city council voted "that a passageway sixteen feet in width be laid out between Canton and Dedham Streets, so as to make the lots ninety-two feet in depth," which action was afterwards approved by the mayor. While this committee was "authorized to lay out and make such streets, passageways, and squares on the public lands, to lay sewers therein, . . . subject to the approval of the board of aldermen," this action of the committee was not shown to have been approved by the board of aldermen. The city has posted, and keeps, at each entrance of Andrew Place a notice: "This is a private way. Dangerous passing." The defendant has built and maintains a brick sidewalk four feet wide along the line of its premises on Andrew Place, erecting posts near the outer edge thereof. The plaintiff is a teamster, and the sidewalk interferes with his use of the way, with his horses, carts, and caravans. If the defendant is entitled thus to interfere with the plaintiff's use of the way by diminishing its width, and appropriating a part of the passageway to the use of foot-passengers, the sidewalk as constructed is found to be a reasonable one.

The defendant cited the St. of 1849, c. 133, and contended that under that statute it was its duty to maintain a sidewalk in Andrew Place, and also contended, independently of the statute, that the construction and maintenance of the sidewalk was a reasonable and proper use of the passageway, which it had a right to make. By this statute it is enacted as follows: "When any street or way which now is or hereafter shall be opened in the city of Boston, over any private land, by the owners thereof, and dedicated to or permitted to be used by the public before such street shall have been accepted and laid out according to law, it shall be the duty of the owners of lots abutting thereon to construct convenient sidewalks on each side of such street or way, at their own expense, in such manner as the safety and convenience of the public shall, in the opinion of the mayor and aldermen of said city, require." Provision is then made, that on neglect or refusal the mayor and aldermen may construct the sidewalk, and assess the expenditure on the abutters, which assessment shall be a lien on their estates; that the act shall not affect any agreement heretofore made respecting such street or way between the owners and the

city; and that the construction of the sidewalk by the city shall not be construed as an acceptance of such way. We assume, without so deciding, that this act of 1849 is still in force, and was not repealed by the St. of 1872, c. 303 (Pub. Sts. c. 50, § 22). *Attorney General v. Boston*, 142 Mass. 200.

It is urged by the defendant, that, to be within the statute of 1849, a way must be opened in the city of Boston over private land by the owners; that this passageway is such a way, as it was opened by the city, through the committee on public lands, for the purpose of selling its land; that it was not laid out nor accepted according to law; and that it was dedicated to, or permitted to be used by, the public; and thus that, as all these conditions existed so far as Andrew Place was concerned, it was its statutory duty to build the sidewalk. But even if, upon an unaccepted street of this character, the mayor and aldermen may compel an abutter, or all the abutters, to build sidewalks, if the safety or convenience of the public, in their opinion, so requires, in such manner as they see fit, such authority on the part of the city does not impose upon the abutter upon a passageway of this description any duty to build a sidewalk for his own convenience or otherwise, or invest him with the right thus to narrow the carriageway. If the defendant had invoked the action of the mayor and aldermen, and they had directed the construction of this sidewalk, quite a different case would be presented. They are not required to order sidewalks to be built where the way is not to be laid out and accepted, and where no reasons of public safety or convenience demand it. Nor are we of opinion that this way can properly be said to be one "dedicated to or permitted to be used by the public." While the defendant does not urge that the evidence shows a dedication, it contends that the evidence does bring the passageway under the alternative clause of a way "permitted to be used by the public." In the connection in which it is used, this phrase means a permission of such a character as would have established, or afforded evidence sufficient to establish, a dedication before the St. of 1846, c. 203 (Pub. Sts. c. 49, § 94). While the way is found to be "a thoroughfare considerably used by various teams and vehicles, both calling at the defendant's houses and passing through, including ice, milk, and city carts, grocer

wagons, and lumber teams," its principal use is evidently for the purpose of bringing supplies to the defendant's houses thereon, although incidentally some vehicles pass through. No abutter has a right to close the passageway, and prevent this use, as he would thus interfere with the rights of others, and this enjoyment of the way is by those who are notified distinctly that it is a private way which they are using, and that the passing thereon is dangerous. This notice does not, indeed, in terms forbid the public to enter upon it, but informs them that they cannot use it as of right.

The defendant further contends, that, independently of the statute, it is fully authorized to build and maintain the sidewalk. A sidewalk necessarily implies a change in the grade of that part of the street where it is laid, as the very object is to elevate that portion of the street above the rest. Where it is guarded by an abrupt curb, as was the sidewalk of the defendant, it would necessarily prevent the use of that part of the way by teams, and, in addition, there was also a row of posts near the edge. Such a sidewalk might be entirely reasonable in itself, and yet sensibly interfere with the use of the way by teams. It is found that it prevents the plaintiff from turning his vehicles so as to drive from the door of his stable in one direction along the passageway without unhitching his horses, lifting the pole of the wagon over one of the posts, and again attaching them; and that sometimes this has to be done a second time. The plaintiff testifies that sixteen feet is necessary to turn his water carts into or from the stable, while it also appears that he uses wagons longer than this. Even if he has another entrance and exit for his teams on Dedham Street, upon which his stable fronts, so that his use of the passageway in question is not one of absolute necessity, he ought not to be deprived of this passageway, or have his rights therein materially diminished. In *Richardson v. Pond*, 15 Gray, 387, the plaintiff prescribed for a way through a gate defined by fixed limits. It was held, that if the erection of an iron post fixed in the ground, in place of a short bar of iron fastened to the building, "caused the way to be narrowed, so that the new gate erected by the defendant furnished a passage less convenient and useful to any appreciable extent for practicable purposes than the old gateway," it

would constitute an obstruction of the right of way. In *Killion v. Kelley*, 120 Mass. 47, it is held to be well settled that, "where there are several owners in common of a private way, each owner may make reasonable repairs which do not injuriously affect his co-owners, but he cannot make any alteration of the course of the way, or any change in its grade or surface, which makes the way less convenient and useful to any appreciable extent to any one who has an equal right in the way."

The plaintiff is therefore entitled to a decree ordering a removal of the sidewalk, and for such damages for its maintenance as may be assessed by a master. *Decree accordingly.*

ELISHA S. CONVERSE *vs.* GEORGE H. HOOD.
SAME *vs.* BOSTON RUBBER COMPANY & others.

Suffolk. March 25, 26, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Corporation — Contract — Trade Name — Fraudulent Representations — Rights of Minority Stockholders — Equity — Specific Performance.

A bill in equity, filed in 1888, alleged that the plaintiff was a stockholder in a corporation chartered in 1853 and engaged in making a certain line of goods; that for thirty years it had been known to the trade by a trade name differing from its corporate name; that a corporation was organized in 1878 with a corporate name the same as the trade name of the senior corporation, and had been engaged in making a distinct line of the same goods; that both had their principal places of business in the same city; that after the junior corporation was organized the plaintiff objected, both to it and to the defendant who was its treasurer and general manager, to its using its corporate name; that the defendant represented to the plaintiff, and promised and agreed, that it did not intend and was not going to make goods that would interfere with those of the senior corporation; that afterwards the defendant informed the plaintiff that the junior corporation intended to increase its capital stock, and asked him to subscribe, assuring him, as inducement thereto, that it was not going to interfere with the goods or business of the senior corporation; that these representations were fraudulently made to induce the plaintiff and the senior corporation to cease opposition to the junior corporation's use of its name, and to induce him to subscribe; that he was thus induced to become a stockholder in the junior corporation, which was preparing to make the same goods as the senior corporation, and use its name in so doing; that the defendant controlled the stock of the junior corporation, as well as the votes of its directors; that a meeting of the junior corporation had been called at which the defendant

intended to vote that it go into the new line of business, and that his vote would govern the result of the meeting; and that its carrying on such new line in its name would be an unlawful use and infringement of the senior corporation's trade name and trade-mark, and greatly lessen the value of the stock of both; and prayed that the defendant might be enjoined from doing anything to depreciate the value of the plaintiff's stock in the senior corporation, and particularly from voting at any meeting of the junior corporation that it engage in such line of business, and for general relief. *Held*, on demurrer, that the bill could not be maintained.

Another bill brought by the same plaintiff against the junior corporation and its four directors, including the same defendant, contained in substance the same allegations, except that the representations and promises were alleged to have been made by that defendant and the junior corporation to that plaintiff and the senior corporation, and also alleged that the use by the junior corporation of its corporate name in the same line of business as that of the senior would be an infringement and a fraudulent use of the trade name and trade-mark of that corporation, and cause great injury to its business and reputation as well as litigation that would be injurious to its interests; and prayed that the junior corporation be enjoined from using its name in the proposed line of business, and from doing certain acts preparatory to entering upon it, and that the directors be enjoined from aiding that corporation so to do by voting therefor at a corporate meeting, or in any way. *Held*, on demurrer, that this bill also could not be maintained.

W. ALLEN, J. These cases are bills in equity, filed in August, 1888, to which the defendants demurred, and which have been argued and may be considered together. The bills are brought by the same plaintiff, and allege that he is a stockholder in the Boston Rubber Shoe Company, a corporation established by special act in 1858, and engaged in the manufacture of rubber boots and shoes; that for thirty years the corporation has been known in the trade by the name of the Boston Rubber Company; that the plaintiff is also a stockholder in the Boston Rubber Company, a corporation established in 1878, and which has been engaged in the manufacture of rubber goods other than boots and shoes, and which is a separate and distinct business from that of the manufacture of rubber boots and shoes; that both corporations have their principal places of business in Boston; that the Boston Rubber Company is preparing to manufacture boots and shoes, and to carry on that business, and use its name in the business, and stamp its name upon boots and shoes manufactured by it. The bills also allege, that George H. Hood is the treasurer and general manager, and holds the controlling interest in the stock, of the Boston Rubber Company, and controls the votes of the directors of that company;

that a meeting of the corporation has been called, at which Hood intends to vote that the company go into the business of manufacturing rubber boots and shoes, and that his vote will determine the action of the meeting; that carrying on that business by the company, in its name, will be an unlawful use of the trade name and trade-mark of the Boston Rubber Shoe Company, and an infringement thereof, and will greatly diminish the value of the stock of both corporations.

The first bill is against Hood alone, and alleges that, after the Boston Rubber Company was organized, the plaintiff objected to Hood and to the company to the use by it of the corporate name Boston Rubber Company; that Hood represented and stated to the plaintiff, and promised and agreed, that the company had no intention of making, and would not make, any goods that would interfere with the business of the Boston Rubber Shoe Company, and was not going to make boots and shoes; that such representation was falsely and fraudulently made to induce the plaintiff and the Boston Rubber Shoe Company to cease opposition to the use by the Boston Rubber Company of its name; that afterwards Hood made known to the plaintiff that the Boston Rubber Company intended to increase its capital stock, and asked the plaintiff to subscribe thereto, and, to induce the plaintiff to do so, assured him that the company was not going to make any goods that would interfere with the business of the Boston Rubber Shoe Company, and would not engage in the business of making boots and shoes; and that this representation was falsely and fraudulently made to induce the plaintiff and the Boston Rubber Shoe Company to cease opposition to the use by the Boston Rubber Company of its name, and to induce the plaintiff to subscribe to the stock of the company, and that the plaintiff was induced thereby to become a stockholder in the Boston Rubber Company. The prayer of this bill is that Hood may be enjoined from doing anything to injure the value of the plaintiff's stock in the Boston Rubber Shoe Company, and particularly from voting at any meeting of the stockholders of the Boston Rubber Company that it engage in the business of making boots and shoes; and for general relief.

The other bill is against the Boston Rubber Company and its four directors, one of whom is the same George H. Hood, and

contains substantially the same allegations as are contained in the first bill, except that the representations and promises are alleged to have been made by Hood and the Boston Rubber Company to the plaintiff and the Boston Rubber Shoe Company. This bill also alleges that the use of the name Boston Rubber Company in the business of manufacturing boots and shoes will be an infringement and a fraudulent use of the trade name and trade-mark of the Boston Rubber Shoe Company, and cause great injury to its business and reputation, and will also cause litigation that will be injurious to the interests of the Boston Rubber Company. The prayer of the bill is that the Boston Rubber Company be enjoined from using its name in the business of manufacturing rubber boots and shoes, and from doing certain acts preparatory to that business; and that the directors of the company be enjoined from aiding the company so to do by voting therefor at a stockholders' meeting, or in any way. There are many other particular allegations in both bills which do not seem to be material.

In regard to the first bill, it is obvious that it cannot be maintained on account of a threatened infringement by one corporation of the trade name or trade-mark of another. Neither the corporate rights of either corporation, nor the collective rights of its stockholders, can be asserted in this suit by one individual against another. The bill cannot be maintained unless it shows a duty owed by the defendant to the plaintiff, which can be enforced in equity. Such duty cannot arise from the relation of the parties as members or officers of corporations, but must be found, if at all, in the representations or promises alleged to have been made by the defendant to the plaintiff. The first of these is so clearly insufficient to give any right of action, for the reason that it is not alleged that anything was done in consequence of the representation or promise, that other objections need not be considered. If a promise is alleged, it was without consideration; if false representations are alleged, they induced to nothing. The other allegation is of false representations, and is in these words: "and thereupon this defendant, for the purpose of inducing your orator to subscribe for and take stock in defendant's said company, again represented to your orator, and assured him in explicit terms, that said junior company was not

going to make any goods that would interfere with the aforesaid business of said Boston Rubber Shoe Company, and particularly said defendant assured your orator that his said company would not engage in the business of making boots and shoes." These are allegations that the representations were false and fraudulent, and that the plaintiff was induced by them to take one hundred and fifty shares in the stock of the Boston Rubber Company.

Without considering whether an action of deceit would lie upon the facts alleged in the bill, the question presented is whether a person, who has been induced to become a stockholder in a corporation by the assurance of a stockholder that the company would not engage in a particular business, can thereby acquire a right in the vote of such stockholders which will be specifically enforced in equity. No contract is alleged the specific performance of which can be enforced, or the violation of which can be enjoined, and fraudulent representations as to the future action of the corporation, by which the plaintiff was induced to subscribe to its stock, cannot give him a right to control the vote of the defendant as a stockholder.

The second bill is brought in behalf of the plaintiff as a stockholder in the Boston Rubber Company, and of all other stockholders who are not defendants, and is brought against that company and its directors. It is, therefore, a bill brought under the collective right of stockholders to restrain the corporation and its directors from doing an act not authorized by its charter, or fraudulent and injurious to its stockholders. But it is a bill of multifarious aspect, and individual rights of the plaintiff were also relied on in argument.

The act sought to be prevented is the undertaking by the defendant corporation of the business of manufacturing rubber boots and shoes. It is not alleged that the corporation has not a right, under its charter, to carry on that business. It is alleged, but not shown, that the intended acts and doings of the corporation will be in violation of the law of this State and of the United States, and beyond the lawful power of the corporation. The alleged injury to the corporation and to its stockholders is, that the proposed action of the defendant corporation will lead it into vexatious and expensive litigation with the Boston Rubber Shoe Company, in defending suits that will be

brought against it by that company to protect itself from what it is alleged will be a fraudulent and unlawful use of its trade name in the business. The bill is brought to restrain stockholders from voting for, and the corporation from carrying on, a business authorized by its charter, on the allegations that by so doing it will infringe the right of another corporation, and expose itself to litigation therefor.

Whether the corporation will run the risk of such litigation is plainly a matter for the majority, and not for the minority, of its stockholders to determine. There is no other allegation of injury to the collective rights of stockholders from the proposed action of the corporation, although it is suggested that the new business is hazardous and will not prove successful. The allegation that the proposed action of the defendant corporation will be wrongful and injurious to the Boston Rubber Shoe Company, and will diminish the value of the plaintiff's stock in the company, in which he is a large shareholder, shows no right in the plaintiff against the defendants, and would not had it been shown that that corporation and its directors were not willing and able to protect its rights.

It is argued that the bill shows that the defendant corporation made a contract with the plaintiff that it would not make boots and shoes, which will be specifically enforced, or a violation of which will be enjoined, at the suit of the plaintiff. There are two parts of the bill which look this way, though neither suggests any right except one individual to the plaintiff, and not common to him and other stockholders. The bill alleges that, on the organization of the defendant company, the plaintiff and the Boston Rubber Shoe Company earnestly remonstrated with the defendant company and Hood, and strenuously objected and protested against the use by the defendant company of the name Boston Rubber Company, and tried to persuade them not to use the name; that the defendants then represented to the plaintiff and the Boston Rubber Shoe Company, and expressly promised and agreed, that the defendant company was not going to make boots and shoes, and that the plaintiff and the Boston Rubber Shoe Company, relying upon such representations, "merely protested." This does not show any consideration for a promise, nor any promise which the plaintiff could enforce, had it been

upon consideration. The other promise relied on to show an individual right in the plaintiff is contained in the representations before set out from the first bill, except that they are alleged to have been made by Hood and the defendant company. There is an allegation that the plaintiff, believing the representations, and relying on the representation and promise of Hood and the defendant company that it would not go into the business of making rubber boots and shoes, took and paid for stock in the company.

The intention of the bill obviously is to charge fraudulent representations and deceit, and not a contract. No contract is alleged or promise set out; the allegations of the falseness of the representations and of fraud are full. The word "promise" is used only in connection with the word "representations" in alleging that the defendant was thereby induced to take the stock. If the words could, under any circumstances, be held to import a contract, such a meaning cannot be given to them as used in the bill. As a contract, it concerned the relations between the plaintiff and the corporation under the contract of subscription to the stock, and was merged in that. The relative rights of the corporation, and of the plaintiff as a stockholder, are found, expressed or implied, in the contract of subscription. Apart from the consideration that that contract is in writing, and cannot be varied by prior oral agreements or promises between the parties, such a contract by a corporation with a particular subscriber to the stock, limiting the rights of the corporation and of other stockholders, is not one which can be specifically enforced in equity. A corporation is a trustee for its stockholders, and holds its franchise for their benefit, and it would be against first principles to enforce specifically a promise made by its agent soliciting subscriptions to its stock, that its franchise shall be exercised in a particular manner for the benefit of one person in consideration that he will become a stockholder.

We think that the bill shows no right in the plaintiff to relief in equity, either against the defendant corporation or the other defendants.

Bills dismissed.

A. A. Ranney & W. S. Rogers, for the plaintiff.

G. Putnam & W. L. Putnam, for the defendants.

PROPRIETORS OF MILLS ON MONATIQUOT RIVER & others
vs. BRAINTREE WATER SUPPLY COMPANY.

Norfolk. March 26, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Water Company — Ultra Vires — Eminent Domain — Damages — "Springs"
— Equity — Injunction — Laches.

Mill-owners on a stream made necessary reserves of water, under the special act of 1818, c. 35, for the use of their mills in Little Pond, a great pond in the town of B., and drew upon them for nearly sixty-five years. A water company was authorized, by the St. of 1886, c. 269, for the purpose of supplying the town of B. with water, to take land, the waters of another great pond in that and another town, and "the waters of any spring or artesian or driven wells within the town of B. and the water rights connected therewith"; and thereupon, on September 26, 1886, took land near Little Pond and constructed in such land a water gallery, and proceeded to pump from the gallery water which percolated into it from the pond and was intercepted by it on its way to the pond, thus substantially lessening the reserves for the mills. On November 8, 1887, the mill-owners filed a bill in equity to prevent this taking of water from Little Pond. *Held*, that the water company had no right to take the waters of Little Pond. *Held, also*, that the owners were not guilty of laches, and were entitled to an injunction to prevent such diminution of their water supply.

BILL IN EQUITY, filed November 8, 1887, to prevent the taking of the waters of Little Pond, a great pond in Braintree, by the defendant, for a water supply. The case was heard upon the pleadings and the report of a master by *W. Allen, J.*, who reported it for the consideration of the full court, and was as follows.

The first named plaintiff was incorporated under the special statute of 1818, c. 35, for the purpose of making reserves of water in various great ponds, among them Little Pond in Braintree, for the benefit of the water privileges on the Monatiquot River. The other plaintiffs were the individual owners of such privileges and the members of the corporation. Little Pond has an area at low water of thirty-nine acres, and at high water of seventy-five acres. In 1823 the plaintiff corporation built, and has since maintained, a dam at the outlet of Little Pond, and raised its waters to high-water mark, making available reserves of water in the pond of about one hundred and ten million

gallons. It also purchased a parcel of land at the outlet, and cut a canal, following to some extent the original brook, from the pond to the river, and lowered the outlet so that it could control the waters of the pond. This water had been exclusively used during the past sixty-five years by the plaintiff corporation for the benefit of the mills upon the stream, up to the time of the taking by the defendant, except that wells had been sunk within the water-shed, and water drawn therefrom by certain landowners for domestic purposes and by the town for fire purposes. The water thus reserved was annually drawn upon for about six weeks in the year, during the dry season, for the use of the mills on the river, and had been used by them among other things for power, for scouring purposes, and for making steam. The use of this water is so important to the owners of such mills that its diminution would seriously injure them, and its loss might cause some of the mills to stop during a portion of the dry season.

The defendant corporation was established under the special statute of 1886, c. 269, for the purpose of supplying the inhabitants of Braintree with pure water. On September 24, 1886, the defendant took about two and a half acres of land on the borders of Little Pond, "for the purpose," as recited in the description duly filed by it in the registry of deeds, "of preserving and protecting the rights and water privileges granted to it by legislative action, and for the building of a reservoir or filter gallery, pumping station, and other structures pertaining thereto, and for all other purposes necessary for the establishment and maintenance of complete and effective works for supplying water to the inhabitants of the town of Braintree." This land was owned at the time by Nathaniel F. Safford, to whom it was conveyed by a deed purporting to convey to him "the rights of the water and lands of said pond so far as they are adjacent to and appurtenant to said premises." The defendant thereupon built, at great expense, a pumping station, and a filter gallery about one hundred feet long by fifteen feet wide and sixteen feet deep, on the margin of Little Pond, and of a capacity of two hundred thousand gallons. At the filing of the bill about one hundred and fifty families and a railroad company were supplied with water by the defendant, to the extent of about

ninety thousand gallons a day ; and at the date of the master's report those who were supplied with water had increased to four hundred families and others, besides which the defendant had established one hundred hydrants which the town had used to some extent for fire purposes.

After the bill was filed, on November 26, 1887, the defendant proceeded to take, as recited in the description then filed in the registry of deeds, "all the springs and wells and water rights connected therewith" in the land previously taken by it, on September 24, 1886, for like purposes. The report of the master recited: "From the situation of the gallery it is plain that, unless the banks of the pond are impervious to water, more or less of it must percolate through the banks into the gallery. The only serious dispute was as to the proportion which came from the pond and from springs respectively, and whether that which came from springs would have found its way to the pond if the gallery had not been made. Without reciting the evidence, I find the preponderance of it to be that a substantial part — much more than half — of the water in the gallery filters in from the pond ; and that all, or nearly all, the remainder would have reached the pond if not intercepted by the gallery. The use of the water during the past season by the defendant diminished the quantity in use for the mills. The taking from the pond of fifty thousand gallons of water a day would materially diminish the supply for the use of the mills. The taking of one hundred thousand gallons daily would diminish the capacity of the pond one third, and that of two hundred thousand gallons two thirds. If the amount of water used by the defendant is increased, a larger proportion will come from the pond than from the land side, and the larger the amount of water used, the greater will be this proportion." *Monatiquot Spring*, referred to in the St. of 1886, c. 269, is not within the watershed of Little Pond, but is located in another part of the town.

E. C. Bumpus, for the plaintiffs.

R. M. Morse, Jr. & M. Morton, Jr., for the defendant.

1. The right of the defendant to take the waters of Little Pond, or any other waters which may flow into its filter gallery, is clearly given by the act of 1886. Great Pond is specifically mentioned because it is situated partly in Randolph, and is for

that reason the only source of supply which is designated by name. But with the single exception of Monatiquot Spring, which is not within the water-shed of Little Pond, the purpose of the act is to give the defendant the right to take any waters within the town of Braintree. The term "waters of any spring" is equivalent to "any waters." In *Peck v. Clark*, 142 Mass. 436, it was held that even a stream of water running upon the surface of the earth might properly come within the description of a spring. *A fortiori*, the waters issuing into the defendant's gallery by percolation from the surrounding or underlying soil, whether from Little Pond or elsewhere, are springs in the literal and accurate, as well as popular, sense of the word, and were taken by the defendant under the clear authority of its charter. Moreover, the defendant had the right by its charter to take the "water rights" connected with the springs and "easements" necessary for holding and preserving the water, which terms would cover all the interest which the plaintiff might have in Little Pond. As an illustration of the broad construction which the court has put upon acts authorizing the taking of land and water rights to furnish a supply of pure water, see *Martin v. Gleason*, 139 Mass. 183.

2. The plaintiffs are not entitled to maintain this suit in equity to restrain the defendant, but should be remitted to an action at law. The plaintiff corporation holds only a revocable license to use the waters of Little Pond without giving any compensation therefor, which license the State might terminate at any time at its pleasure. *Watuppa Reservoir v. Fall River*, 147 Mass. 548. *Flax Pond Water Co. v. Lynn*, 147 Mass. 31. It could not prevent landowners at any or all points within the limits of the water-shed from sinking wells and drawing water therefrom, as in fact has been done, although such wells might thereby intercept water which would otherwise reach Little Pond. *Greenleaf v. Francis*, 18 Pick. 117. *Chase v. Silverstone*, 62 Maine, 175. *Ocean Grove v. Asbury Park*, 13 Stew. 447. *Bloodgood v. Ayers*, 37 Hun, 356. *Chasemore v. Richards*, 7 H. L. Cas. 349. Actions of tort have been the usual remedies for unauthorized proceedings for obtaining and furnishing a public water supply. See *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121

Mass. 286 ; *Warren v. Spencer Water Co.* 143 Mass. 9 ; *Kenison v. Arlington*, 144 Mass. 456 ; *Pickman v. Peabody*, 145 Mass. 480. If the defendant is acting *ultra vires*, the proper remedy is by an information brought by the Attorney General. *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361. *Hart v. Jamaica Pond Aqueduct*, 133 Mass. 488, is distinguishable from the case at bar.

3. It must be conceded that the defendant has established its works in good faith, under a claim of right under its charter, that the plaintiff unnecessarily delayed to bring its bill until after the defendant had incurred large expense, and that an injunction as prayed for by the plaintiff would impose great loss upon the defendant, and would be a serious inconvenience and injury to the inhabitants of Braintree. Under these circumstances the plaintiffs have been guilty of laches, and have lost their rights in equity, if they had any, and must look to their remedy at law. *Fuller v. Melrose*, 1 Allen, 166. *Cooper v. Hubbuck*, 7 Jur. (N. S.) 457. *Bankart v. Houghton*, 27 Beav. 425 ; *S. C.* 28 L. J. Ch. 473. *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515. Further, it cannot be denied that money will compensate the plaintiffs fully for any injuries which they may have received.

DEVENS, J. The first question presented by the report is whether the right to take the waters of Little Pond, or the springs which supply it and which are within its water-shed, was granted to the defendant corporation by its charter. This charter was granted by the St. of 1886, c. 269. Section 2 of this act provided that the defendant might take the waters "of Great Pond in the towns of Braintree and Randolph, and the waters of any spring or artesian or driven wells within the town of Braintree, and the water rights connected therewith, except the property known as the Monatiquot Spring, so called, in South Braintree, and also all lands, rights of way, and easements necessary for holding and preserving such water and for conveying the same," etc.

The plaintiff corporation was established by the St. of 1818, c. 35, and was and is composed of the owners of mill privileges on Monatiquot River. As proprietors of mills on Monatiquot River, they were granted "full power, liberty, and authority to

make the reserves of waters wished by them in the following described ponds, or any of them, viz.: . . . the Little Pond, so called, lying in the centre of the town of Braintree, containing about seventy acres." They were authorized in their corporate capacity to erect suitable dams for said purpose, to preserve them so as to raise the waters in said ponds as high as their original bounds, to lower the outlets, and to draw off such portions of said waters as from time to time they might think best. The plaintiffs under this authority have used Little Pond as a reservoir by maintaining a dam at its outlet, where they own a parcel of land, whereby the water is retained until they have occasion to draw off the same for the use of their mills. For about six weeks in the year, the water is of great importance to them. If deprived of it, it might be necessary to stop some of their mills during a portion of the summer, and its diminution would seriously injure them all.

Upon the shore of Little Pond, and near it, the defendant has constructed and maintains a filter gallery, from which it draws water with which it supplies its customers, and it is found "that a substantial part—much more than half—of the water in the gallery filters in from the pond; and that all, or nearly all, the remainder would have reached the pond if not intercepted by the gallery. The use of the water during the past season by the defendants diminished the quantity in use for the mills." It also appears, that, "if the amount of water used by the defendant is increased, a larger proportion will come from the pond than from the land side, and the larger the amount of water used, the greater will be this proportion." It is the contention of the defendant, that the words "spring" and "water rights connected therewith" are sufficiently comprehensive to include this pond, and that the act gave the right to take any waters in the town of Braintree with the exception of Monatiquot Spring, which is not within the water-shed of Little Pond, leaving to the plaintiffs their statutory right to compensation therefor, if they are entitled to any.

But a pond is quite distinguishable from the various sources of supply, whether those are the surface waters, or brooks or springs which create and maintain it. When so large as to have become what is known as a great pond, it is subjected to all the

rights which the public possess, or which the Legislature may be entitled to grant therein. The fact that the act under which the defendant claims specifies Great Pond, so called, as one which may be taken, strongly indicates that the right to take other ponds of that class was not conferred. "Spring," as the word is generally used, means the source of supply issuing from the earth, or found therein by digging or otherwise opening it, and "the water rights connected therewith" are those bubbling up therewith or flowing therefrom. While in *Peck v. Clark*, 142 Mass. 436, it was held that a stream of water whose source was on the adjoining land might pass by a conveyance as a spring, it was so because the evidence showed that this was what the parties had sought to describe, and that the word had been used by them with reference thereto.

If the water cannot be taken directly from Little Pond, it cannot be drawn therefrom by percolation. *Hart v. Jamaica Pond Aqueduct*, 133 Mass. 488. The process by which the defendant obtains it is unimportant, and this method is one well known and often found convenient. It has often been held to be as complete a taking of water as the withdrawal of it by pipes. *Brookline v. Mackintosh*, 133 Mass. 215. *Cowdrey v. Woburn*, 136 Mass. 409. The water gallery, as described, is not intended to gather alone the water naturally upon or belonging to the land where it is; but, being located on the shore, the waters of the pond percolate through the intervening earth and fill it. Nor does the fact that the defendant has purchased the land bordering upon the pond authorize it to withdraw the waters thereof for their purposes as a corporation. *Potter v. Howe*, 141 Mass. 357. We are therefore of opinion that the defendant is not entitled to take the waters of Little Pond as it now does.

The plaintiffs claim the right not only to the entire waters of the pond, but to those within its water-shed, and urge that the proper construction of the defendant's charter does not authorize it to construct any well or gallery which would intercept any water which otherwise would reach the pond, and that the defendant's right to take any springs is thus limited to those which are outside the water-shed of this pond. This would be to construe the defendant's charter too narrowly. The corporation is created for an important public purpose, and is authorized to

take "the waters of any spring or artesian or driven wells within the town of Braintree," etc. The reason why we hold that this does not authorize the taking of the waters of Little Pond is, that the water thus collected is known by a different description from those waters which are its sources of supply, but it is contemplated that these may be taken. It is the right of each landowner to dig wells on his own premises, even if he thereby intercepts the flow of water to his neighbor's well or stream. *Greenleaf v. Francis*, 18 Pick. 117. *Chase v. Silverstone*, 62 Maine, 175. If all that the defendant had done was to construct a gallery which would reach the underground sources of supply alone which were on the land where it was constructed, or even the surface water which might flow thereon, quite a different case would be presented from that which is here found. When the defendant constructed a gallery, the principal use of which was to take water from the pond, which it had no right to do even if it thereby obtained some water which it might lawfully have appropriated, it had not fairly exercised the authority with which it was intrusted, and, independently of any rights which it might have to take the springs, the plaintiffs could fairly ask that it should be enjoined from maintaining it.

If the defendant has no right to take the waters of Little Pond, it is necessary to inquire whether the plaintiffs have any such right therein that they may ask the protection of the court in the enjoyment thereof, as against the defendant, who is supplying water to certain inhabitants for domestic purposes. It is the contention of the defendant that the plaintiffs had, at most, a revocable license to use and enjoy certain public property, which the State might terminate at any time at its pleasure. *Watuppa Reservoir v. Fall River*, 147 Mass. 548. It is not necessary now to consider whether, under their charter and the acts done under it by them, the plaintiffs have any vested rights in the waters of this pond, or to the use of them, which could be taken away without providing compensation therefor. There is no controversy here between the plaintiffs and the Commonwealth. Even if it be conceded that the plaintiffs hold any rights which they may have in the waters subject to the paramount right of the Commonwealth to use the waters for public purposes, or to authorize others so to use it; either with or

without compensation, the plaintiffs have a right to use it against one to whom this authority has not been granted, in which right they are entitled to be protected.

The plaintiffs have erected and maintained their dams, have had the exclusive control and use of the waters of this pond for sixty-five years, have erected valuable mills which have been of incidental benefit to the community, and have had the advantage during that time of the waters for their mills. Without considering whether this, under all the circumstances, would give more and greater rights, it is sufficient at least to entitle them to the enjoyment thereof as against a corporation acting *ultra vires* in removing this water. Nor is it any answer to say that the defendant is doing a valuable public work in supplying the citizens of Braintree with this water. Its right to take the waters lawfully collected and enjoyed by others is still limited to that which is conferred by its charter.

While actions at law have often been resorted to as a remedy for the wrongful withdrawal of waters, they are not the only remedy. The defendant is doing damage to the mills of the plaintiffs, which can only finally be remedied by injunction. An action at law would compensate the plaintiffs only for the injury which the plaintiffs have already sustained. The provision of the St. of 1886, c. 269, § 4, which permits any party sustaining damages under the act to have the same "assessed and determined in the manner provided by law when land is taken for the laying out of highways," etc., is applicable only to those which are caused by the rightful action of the defendant under its charter.

Nor have the plaintiffs been guilty of such laches as should deprive them of a remedy in equity unless they shall first establish their right at law. The defendant formally took under its charter a parcel of land, which it now owns, and on which it has erected its water gallery, which belonged to one Safford. This was in September, 1886, and it would seem that, as this tract was on the border of the pond, it was deemed by the defendant that it could thus lawfully withdraw the waters of the pond. Safford had no rights other than those of a littoral proprietor, and these gave him no private property in the waters of the pond. *Potter v. Howe*, 141 Mass. 357, 359. It was not until

after the bringing of this bill, that the defendant made a formal taking of "all the springs, wells, and water rights connected therewith in the tract or parcel of land" taken. On this latter taking it has been permitted to rely at the hearing, and the effect of it we have necessarily discussed in considering what were its rights acquired under its charter, as by these its powers are defined.

Upon the whole case, we are of opinion that the plaintiffs are entitled to an injunction forbidding the defendant from withdrawing the water from Little Pond, and from using the gallery constructed by it unless the gallery can be so altered that it may be used without producing this result. *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483, 488. *Emporia v. Soden*, 25 Kans. 588. *Judgment accordingly.*

HENRY AMY *vs.* JEROME F. MANNING.

Suffolk. March 29, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Equitable Attachment — Receiver — Assignment of Chose in Action —
Non-resident — Discovery by Interrogatories.*

A creditor sought to reach and apply in payment of his debt moneys due from various persons to his debtor, who was a resident of this Commonwealth, or was found here, by a bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 285, for the appointment of a receiver and for the assignment of such debts to the receiver for his benefit; but he did not name such persons or particularly describe the debts in the bill, nor did he attempt at the hearing specifically to describe the debts or seek to find out or offer to prove who the persons were, beyond the fact that they were non-residents. *Held*, that the bill was rightly dismissed.

BILL IN EQUITY, filed October 20, 1887, under the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 285, to reach and apply in payment of a debt due to the plaintiff from the defendant, an attorney at law, sums of money alleged to be due to the defendant from various persons for his fees in prosecuting their claims before the Court of Commissioners of Alabama Claims.

The defendant demurred to the bill, among other things, for want of equity. Hearing upon the bill, answer, and an offer of proof by the plaintiff, before *W. Allen, J.*, who dismissed the bill, and reported the case for the consideration of the full court. The material facts appear in the opinion.

J. M. Hall, for the plaintiff.

C. Cowley, for the defendant.

FIELD, J. The plaintiff's case, as stated in the bill is, in substance, that he has recovered a judgment against the defendant, on which execution has been issued, which has been returned unsatisfied; that there are large sums of money due to the defendant from various persons for his fees in prosecuting their claims before the Court of Commissioners of Alabama Claims; that most of these claims have been allowed, and in some of the cases United States Treasury drafts payable to the claimants have been sent to the defendant for the payment of the claims, which the defendant refuses to deliver to the claimants; that, by reason of the improper conduct of the defendant, the drafts remain uncollected, and the sums of money due him for fees remain unpaid, and he has become involved in many lawsuits; that these debts due to the defendant constitute the only property which he has which can be applied to the payment of his debts; and that the defendant is incapable of properly managing his affairs, and there is danger that this property will be wasted. The prayer of the bill is, that the defendant may be enjoined from collecting any of these debts, and may be compelled to assign them to a receiver; that a proper person may be appointed receiver to collect the debts, and that the proceeds may be applied to the payment of the plaintiff's judgment. There is also a prayer for discovery and for general relief.

The persons who are indebted to the defendant are not named in the bill, or described in any manner, but the plaintiff offered to prove, as recited in the report, that they "lived in all parts of the United States and in foreign countries, viz. Russia, West Indies, France, and Spain." It is not alleged, and the plaintiff did not offer to prove, that the defendant had a lien on the drafts to secure the payment of the debts due to him; but if he had such a lien, the drafts could not be taken and applied to the payment of the plaintiff's judgment, unless the debts for the

payment of which they are security could also be so taken and applied. It is apparent that the bill states some reasons why a guardian should be appointed over the defendant, or why the defendant should go into insolvency, and an assignee of his estate be appointed; but neither of these things can be done by proceedings in equity. The bill in effect asks the court to compel the defendant to make a general assignment of all debts due to him, that the assignee may collect them for the benefit of the plaintiff.

Whatever may have been the practice in the State of New York before the enactment of any statutes on the subject, it has never been considered in England or in this Commonwealth within the general powers of a court of equity to compel a general assignment of all the property, or of all the choses in action, of a debtor in a suit brought by a judgment creditor to collect his judgment. There are statutes here which authorize the appointment of receivers in certain cases, and a court of equity may undoubtedly appoint receivers in cases not enumerated in the statutes; but no precedent has been found here for the appointment of a receiver to collect debts due to a defendant from persons in foreign jurisdictions, in a suit brought by a judgment creditor against his debtor under the general equity jurisdiction. Without the aid of statutes, the title to such choses in action belonging to the defendant would not pass to a receiver by virtue of his appointment; nor would a receiver, as such, have authority to bring suits on choses in action in foreign jurisdictions. *Harvey v. Varney*, 104 Mass. 436. *Booth v. Clark*, 17 How. 322. *Brigham v. Luddington*, 12 Blatchf. 237. *Yeager v. Wallace*, 44 Penn. St. 294. High on Receivers, §§ 209, 239.

Whether this suit can be maintained must, therefore, depend upon the construction of the Pub. Sts. c. 151, § 2, cl. 11, and of the St. of 1884, c. 285. See *Pettibone v. Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411. Before the passage of the statute of 1884, this suit could not have been maintained, because the debtors of the defendant have not been made parties. *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558. This statute expressly provides, in § 1, that the fact "that the property sought to be reached and applied is in the hands, possession, or

control of the debtor independently of any other person, or that it is not within the State," shall not prevent the plaintiff from maintaining his bill. Under this statute it has been held that such intangible property as letters patent in the possession of the debtor can be reached without making any other person a party to the suit, and both before and since its passage promissory notes have been reached by this process without making the makers of the notes parties. *McCann v. Randall*, 147 Mass. 81. *Wilson v. Martin-Wilson Co.*, ante, 24.

Whether debts due to inhabitants of this Commonwealth, or to persons found here, from persons who are not resident within the Commonwealth and do not have a usual place of business here, and who are not made parties to the suit, can be reached in a suit in equity brought here when the debts are not in the form of promissory notes, or other negotiable instruments, is a question of some difficulty. Such debts due from persons who are resident within the Commonwealth, or have a usual place of business here, can usually be reached by creditors of the persons to whom they are due by trustee process, and this is the only remedy in cases where it can be used. Pub. Sta. c. 183, § 1. *Emery v. Bidwell*, 140 Mass. 271. Debts due from non-residents are, in their nature, property which according to our laws can be attached in a suit at law, and it is only in a qualified sense that they can be said to be property in the possession of the person to whom they are due. The only reason why they cannot be attached at law in this Commonwealth is, that they are due from persons who have no place of residence or usual place of business here. Unless the persons who owe them choose voluntarily to pay them, they must be collected in jurisdictions where such persons or their property can be found.

Whether creditors of the person to whom the debts are due, in order to attach them, must go to the jurisdictions where the persons who owe them can be found, or whether an assignment from the person to whom they are due can be compelled by a court of equity having jurisdiction over him, is the question presented. If it is the intention of the statutes that such debts due to an inhabitant of the Commonwealth, or to a person found here, can be reached by his creditors in a suit in equity brought here, the procedure contemplated in this bill is undoubtedly the

only one that would be effectual, unless the persons who owe the debts become parties to the suit. Such debts must either be sold under the direction of the court, and assigned to the vendee, or they must be assigned to some person appointed by the court to collect them, and the proceeds of the sale, or of the collections, must be applied to the payment of the debt due to the plaintiff.

We do not, however, feel called upon to decide in this case whether such debts can be reached by this procedure, because, if they can be, we are of the opinion that they must be specifically described and assigned. The equitable attachment made by a suit in equity ought to be as specific as an attachment of personal property at law, so far as the nature of the property will permit. Not only the nature of the debts, but the persons who owe the debts, should be described, that the court may, if it sees fit, order notice to be given to them. If a sale is made, or an assignment is executed, under an order of the court, the property sold or assigned ought to be identified. In our opinion, the statutes do not intend that the court should order a general assignment of all debts due to the defendant, or of all debts of a particular description, without knowing what they are and from whom they are due.

It is true, that in a bill of this kind a plaintiff may have need of a discovery from the defendant in aid of the relief he seeks. Before the passage of the St. of 1883, c. 223, that discovery might be had in the answer of the defendant. Since the passage of this statute, by the provisions of § 10, if the bill asks for relief, the answer cannot be sworn to, and discovery can only be had by interrogatories to the defendant, as in actions at law. The plaintiff in this case has not filed such interrogatories to obtain from the defendant any information of the names of the persons who are indebted to him, or of the amounts which are due from each. He has not offered to amend his bill so as specifically to describe the debts which he desires to reach. Apparently he did not offer to prove the names of the persons from whom the debts were due. Whatever may be the construction to be given to our statutes with reference to the right of a creditor to reach debts due from persons resident without the Commonwealth to his debtor who is found here, we think

that the case which the plaintiff stated, and which he offered to prove, is too broad and general, and that on the hearing the bill was rightly dismissed. Whether the bill would have been held bad on demurrer need not be considered. The other objections of the defendant have become immaterial.

Decree affirmed.

UNION CATTLE COMPANY & others *vs.* INTERNATIONAL
TRUST COMPANY.

Suffolk. March 29, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Creditors — Foreign Corporation — Negotiable Coupon Bonds — Collateral
Security — Insolvency — Receiver — Foreign Court — Injunction.*

A Wyoming cattle company issued unsecured negotiable coupon bonds, payable in ten years from date, and shortly afterward deposited some of the bonds with a trust company here, under an agreement that they should be held as collateral security for promissory notes given by the former to the latter for money lent. Subsequently the cattle company was declared insolvent, in proceedings in the Wyoming courts, and receivers were there appointed to wind it up. Upon default in the payment of the promissory notes, the trust company gave notice of its intention to sell the bonds held as security for the satisfaction of its claim. *Held*, upon a bill in equity brought by the cattle company, the receivers, and other bondholders to enjoin the sale, first, that, so far as the plaintiffs' case rested upon the equity of creditors to share equally in the property of the cattle company which was being distributed by the court of Wyoming, it was for that court to determine what the rights of creditors were, and if the defendant chose to take the consequences of a sale an injunction would not be issued to prevent it; and secondly, that, as between the cattle company and the trust company, there was nothing in the contract of pledge which would prohibit the sale.

BILL IN EQUITY, filed March 31, 1888, to prevent the sale of coupon bonds issued by the Union Cattle Company, a Wyoming corporation, and held by the defendant trust company, which was incorporated in this Commonwealth, as collateral security for a debt due to it from the cattle company. Hearing upon the pleadings and agreed facts, before *W. Allen, J.*, who reserved the case for the consideration of the full court, in substance as follows.

The plaintiffs other than the Union Cattle Company were the receivers appointed to wind up its affairs, and other holders of like bonds, who appeared for themselves and for others with like interests. These receivers were appointed by a court of Wyoming Territory, in January, 1888, pending a suit in equity before it to dissolve the corporation and to wind up its affairs; and the corporation was at the same time declared insolvent.

The cattle company was engaged in raising and selling cattle in Wyoming until its business was suspended by its insolvency, and its property, all of which pertained to its business, was situated in that Territory and vicinity. The receivers had taken possession of all such property, and were engaged in converting it into money, and the company had wholly ceased to do business and continued a merely formal and nominal existence. The assets of the company, so far as estimated, were far from sufficient to meet its direct liabilities aside from its bonds, and could not be ascertained with certainty, as the title to much of its property was in litigation, and the rest of it had no fixed market value.

In November, 1886, the cattle company issued coupon bonds to the amount of \$1,400,000. Each bond was dated November 1, 1886, and was duly signed by the cattle company and under seal, and contained the following :

"The Union Cattle Company, a corporation duly organized under the laws of the Territory of Wyoming, promises to pay to the International Trust Company, trustee, or bearer, one thousand dollars, on the first day of November, 1896, with interest semiannually, at the rate of seven (7) per cent per annum. . . . This bond is one of a series of fourteen hundred bonds, bearing even date, and of like tenor and amount, and is entitled to the benefits and subject to the conditions of an agreement between said Union Cattle Company and said trustee, bearing date November 1, 1886, whereby it is provided that a sinking fund of not less than fifty thousand dollars nor more than one hundred thousand dollars in each year shall be applied to the purchase or drawing at par of said bonds, and that the whole issue may be drawn at par on November 1, 1891, or any coupon day thereafter."

The agreement referred to, which was of even date with the bonds, was duly executed by the cattle company and the trust

company, and, after stating the purpose of the cattle company to issue the bonds and setting out a copy of one of them, recited that the cattle company was to pay to the trust company, "on or before the first day of November in each year, until all of said bonds shall be fully paid or cancelled, not less than fifty thousand dollars (\$50,000), and as much more at any time, not exceeding \$100,000 in any one year, as said company shall see fit to pay, to be held and managed by said trustee," for the purchase or drawing of bonds in a manner provided for, which bonds were then to be cancelled and delivered up to the company; that the cattle company reserved "the right to call and pay off, at the office of the trustee, on November 1st, 1891, or on any coupon day thereafter, the entire issue then outstanding at par, and accrued coupon interest, upon giving notice by publication" in a manner stated, interest to cease thereon from the last day of such publication; that the cattle company agreed never to place any mortgage or other lien on its property, unless the bonds were also secured thereby; that, upon any default by the cattle company, the bondholders might enforce their rights and collect the amount of the bonds, but without any expense to the trust company; that the trust company should receive certain compensation for its services, and should not be responsible save for gross negligence; and that the trust company accepted the trust. The bonds were not secured otherwise than as appeared by the trust agreement.

Of the total issue, bonds to the value of \$780,000 were sold outright to eleven persons, most of whom were stockholders of the cattle company, and were still held by such persons except in case of the defendant. The bonds then remaining, amounting to \$620,000, were delivered by the company as security for debts owed by it to various persons, in whose hands they still remained, all of such debts being overdue and unpaid. The coupons maturing on November 1, 1887, were paid, but none have been paid since that time, and the bonds are not publicly dealt in. Bonds of the par value of \$59,000 of those originally sold were taken up by the trust company in 1887 with \$50,000 paid in by the cattle company to the sinking fund for that purpose, under the provisions of the trust agreement; a small balance of that sum remained in the hands of the trust company, but would all be

exhausted by the payment of the fees due to the trustee under the trust agreement.

The defendant trust company, in or about November, 1886, bought bonds from the cattle company to the amount of \$100,000, and before May 27, 1887, had sold all but twenty-four bonds, which it still continued to own. On or about May 27, 1887, the trust company lent to the cattle company the sum of \$60,000, upon receiving its promissory notes for that amount, and also received as collateral security fifty-five of its bonds, for which the trust company signed and gave to the cattle company the following receipt: "May 27th, 1887. Received of Union Cattle Co. fifty-five thousand dollars in Union Cattle Co. 7 % debenture bonds, the same to be held as collateral security for any liability of said Union Cattle Co. to said Trust Co. 55,000 Union Cattle Co. Bonds."

Since that date a portion of the loan had been paid, but the defendant still held, as representing the balance due thereon, two unpaid promissory notes of the cattle company, amounting to \$35,000, one for \$25,000, dated September 27, 1887, payable four months from date to the order of the trust company, and the other for \$10,000, dated November 29, 1887, and also payable to its order six months from date, and still held the fifty-five bonds above mentioned as collateral security. The defendant claimed the right to sell these fifty-five bonds, to satisfy not only the two notes held by it, but also the twenty-four bonds which it owned, and had served upon the receivers a notice of its intention to sell the bonds upon a day named, as the cattle company "has failed to pay the note for \$25,000 due Jan. 27-30, 1888," and to apply the net proceeds thereof to the satisfaction of such debts.

J. B. Warner, (H. E. Warner with him,) for the plaintiffs.

1. Inasmuch as the bonds are only the unsecured obligations of the Union Cattle Company, that company did not, by depositing them with its promissory notes, create a pledge, in the usual sense of that word, nor confer, by implication, the rights of sale which usually accompany the delivery of security. The theory of a pledge is, that property is placed with the creditor to be applied to the payment of the principal debt, if that is not met when due. When the debtor secures his debt

by another contract of his own to pay money, the second contract has no absolute or independent efficacy, so long as the first is not dishonored. It is not a debt until the contingency happens which is to make it one, and until then it is, in effect, only a promise to pay if the principal debt is not paid. When the contingency happens which is to give it validity, it becomes an effectual obligation, but it may be performed by performing the first, and, whatever sum it may seem to represent, it is actually regulated wholly by the primary or principal liability. The two contracts represent but one actual obligation, and are to be construed together. They amount to a penal bond conditioned to pay a less sum than the penalty, the secondary contract representing the penalty. They do not represent independent and cumulative obligations, any more than if a debtor agrees to give security if his debt is not paid, or to buy the security at a stated price. In such cases the creditor has a choice of remedies, but cannot compel the debtor to do more than satisfy the principal debt. It is therefore clear, that so long as the two obligations remain in the same hands they cannot both be enforced against the debtor. Is it now permissible for the creditor, who cannot himself enforce both obligations, to accomplish, more or less completely, the same result, by selling his secondary obligation, crediting only what it may bring, and giving the buyer the power to enforce it for the full amount? From the point of view of the debtor, this is allowing that to be done indirectly which may not be done directly. It compels the debtor to discharge his debt by the payment of a penalty, and a penalty which is uncertain in its operation, since it depends upon the price which may be got for the obligation which is sold. The greater the inability to pay, and the consequent loss of credit, the greater is the total amount which the debtor will be compelled to pay. Of course, if the collateral obligations have security attached to them, or carry any rights or advantages other than the liability of the debtor, these collateral rights may be enforced. *In re Regent's Canal Ironworks Co.* 3 Ch. D. 43. *Third National Bank v. Eastern Railroad*, 122 Mass. 240. *Morris Canal & Banking Co. v. Fisher*, 1 Stockt. 667. *Morris Canal & Banking Co. v. Lewis*, 1 Beas. 323. *Jerome v. McCarter*, 94 U. S. 734. *Potter v. Thompson*,

10 R. I. 1. These cases rest upon the reason, that the only way to reach the security which is attached to the pledged obligation is to deal with those obligations themselves as security. But in the present case the bonds are nothing but the plain unsecured obligations of the debtor. The fact that they are under seal does not give them any additional value. They have no independent force which can carry liability, regardless of the way in which they are held.

2. Whatever may be the situation as between the creditor and his debtor alone, when we come to the equities which exist in favor of creditors we have a case which is not open to doubt upon the authorities. It seems well settled, both in bankruptcy and insolvency, and under winding up proceedings, in England, that a creditor holding such double obligations cannot prove upon both, nor can he sell the pledged obligations in such a way as to give a purchaser the right of full proof, unless he gives credit for the full face value. *Third National Bank v. Eastern Railroad*, 122 Mass. 240. *Merchants' National Bank v. Eastern Railroad*, 124 Mass. 518. *Ex parte Farnsworth*, 1 Lowell, 497. *In re Blakely Ordnance Co.* L. R. 8 Eq. 244. *In re Oriental Commercial Bank*, L. R. 7 Ch. 99. *Ex parte Macredie*, L. R. 8 Ch. 535. It will be argued, that to prohibit a sale here is to interfere with the agreement which the parties have made; that the debtor, by depositing the bonds as security, has made a contract of pledge, one of the common law incidents of which is the right to sell the security on default; and that, if this is denied, nothing is left, the transaction has no meaning, and the bonds have no value to the holder. But when the debtor is thrown into insolvency, and his assets are to be divided equitably among competing creditors, then certainly there are settled principles curtailing rights which the creditor might otherwise enjoy, and these enter as qualifications into every contract. The principle which the plaintiffs invoke here is like that which prevents the creditor of a copartnership from deriving any benefit from the assets of the individual partners until separate creditors are paid, although outside of insolvency their property may be taken for the debt. Furthermore, it is assuming too much to say that the right of sale is an incident which the law attaches to a transaction such as this. Our contention is, that the law has never recognized

such a right, nor has it recognized this as a pledge at all in the legal sense, so that the creditor, in relying upon a supposed implied right of sale, has relied upon what never existed.

3. There are in this case special considerations, growing out of the character of the bonds, which should serve to prevent a sale. When a pledge consists of ordinary commercial paper, the preponderance of authority is against permitting it to be sold as an ordinary chattel, since such obligations are not marketable. *Fletcher v. Dickinson*, 7 Allen, 23. *Wheeler v. Newbould*, 16 N. Y. 392. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.* 82 Ill. 548. Negotiable bonds are usually sold as chattels, and rightly, because they are mortgage bonds and because they have a market value. When, however, the bonds are not mortgage bonds and have no market value, but are simply notes under seal, they seem to fall within the rule applicable to commercial paper, and a sale would be an unfair proceeding.

M. Morton, Jr., (*R. M. Morse, Jr.*, with him,) for the defendant.

FIELD, J. We assume, without consideration, that if the cattle company were a Massachusetts corporation in insolvency, under our laws the trust company would not be permitted to prove its debt without surrendering the bonds which it held as collateral security at the time of the commencement of the proceedings in insolvency, as well as the bonds and notes which represented the actual amount of the indebtedness of the cattle company at that time, and that if the trust company, after the commencement of proceedings in insolvency, sold the bonds held as collateral, the purchasers would be excluded from proving them, and the trust company would be excluded from proving even the remainder of its debt after deducting the proceeds of the bonds sold. See *Third National Bank v. Eastern Railroad*, 122 Mass. 240; *Merchants' National Bank v. Eastern Railroad*, 124 Mass. 518; *Ex parte Farnsworth*, 1 Lowell, 497; *In re Blakely Ordnance Co.* L. R. 8 Eq. 244; *In re Oriental Commercial Bank*, L. R. 7 Ch. 99; *Ex parte Macredie*, L. R. 8 Ch. 535; *Costello v. Crowell*, 134 Mass. 280.

We infer from the agreed statement of facts, that the proceedings in equity which are pending are within the jurisdiction of the court of Wyoming, and that that court can dissolve the cor-

poration, wind up its business, and distribute its property among its creditors. We do not know on what principles the distribution of the property under the control of that court is to be made, for we do not judicially know the law of the Territory of Wyoming. It may or may not be the law of that Territory, as administered by its courts, that the claims shall be made up as of a particular time; that the claimants shall be admitted as creditors only to the extent of the actual indebtedness of the corporation to them at that time; and that, if they then held unsecured obligations of the corporation as collateral security for the payment of its indebtedness, those obligations must be surrendered before they can be admitted as creditors to share in property in the custody of the court. As the trust company is a corporation established by the laws of Massachusetts, it is plainly beyond the power of the Territory of Wyoming to pass any law that will discharge the obligations held by the trust company; but it can prevent the trust company from sharing in any property of the cattle company which the courts of Wyoming have taken into their custody, except upon the condition that the trust company conform to the general laws which it has established for the distribution of the assets of its insolvent corporations.

So far as the plaintiffs' case rests upon the equity of creditors to share equally in the property of the cattle company, which is being distributed by the court of Wyoming, it is for that court to determine what the rights of creditors are. It does not appear that the trust company intends to ask to be admitted to share in the property in the custody of the court in Wyoming, and if it does not, it is difficult to see how its rights are affected by the proceedings there. If it is considered inequitable by the court of Wyoming for the defendant at this time to sell the bonds held as collateral, it does not appear that that court has not the power to protect the property in its custody from any attempts that may hereafter be made to prove for their full amount all the obligations which are now held by the trust company, whether that attempt is made by the trust company, or by it and the persons who purchase the bonds held as collateral if they are sold. We do not see how the mutual rights of creditors to share in the property under the control of the court in Wyoming can be determined by this court. If, by the law of Wyoming, the trust

company precludes itself from sharing in that property if it now sells the bonds held as collateral, this is no reason why the company should be prevented from selling the bonds if it chooses to take the consequences.

Whether the cattle company, in its own behalf, can maintain this bill to restrain the defendant from selling the bonds which it holds as collateral security, depends upon the contract between the parties. The receipt given by the trust company shows that these bonds, amounting to \$55,000, par value, are "to be held as collateral security for any liability of said Union Cattle Company to said trust company." The defendant holds bonds of the cattle company to the amount of \$24,000, which it bought, and two promissory notes of the company for money lent, one for \$25,000, dated September 27, 1887, payable in four months from date to the order of the defendant, and one for \$10,000, dated November 29, 1887, payable in six months from date to the order of the defendant. On February 28, 1888, the defendant gave to the receivers of the cattle company notice that, as that company had failed to pay the note for \$25,000, which was then overdue, it would sell the bonds which it held as collateral at public auction and would apply the net proceeds to the satisfaction of the two notes, and of the bonds which it owns. The bonds it holds as collateral security are of the same tenor as those it owns. They are coupon bonds issued by the cattle company, of \$1,000 each, payable to bearer on the first day of November, 1896, with interest payable semiannually upon surrender of the coupons. They are expressly made subject to the conditions of an agreement between the cattle company and the trust company, which is the trustee in the agreement under which the bonds were issued, "whereby it is provided," as expressed in each bond, "that a sinking fund of not less than fifty thousand dollars nor more than one hundred thousand dollars in each year shall be applied to the purchase or drawing at par of said bonds, and that the whole issue may be drawn at par on November 1, 1891, or any coupon day thereafter." We think that these bonds are negotiable by virtue of the Pub. Sts. c. 77, § 4, as well as by custom, notwithstanding the conditions referred to in them, and that on their face they appear to be bonds which were intended to be bought and sold in the market.

In *Third National Bank v. Eastern Railroad*, 122 Mass. 240, 243, it is said, citing *Morris Canal & Banking Co. v. Fisher*, 1 Stockt. 667, that "great doubt is expressed whether a debtor's own obligation has ever been held to be a pledge which can be sold in the market and applied as such." If the parties agree that the debtor's obligation shall be held as collateral security for the payment of a debt, and may be sold if the debt is not paid when it becomes payable, we see no reason why the agreement should not be carried into effect, so far as the parties to it are concerned. If there has been no express agreement to that effect, yet if such an agreement is implied in the contract which the parties have made, it may, we think, be enforced in the same manner as any other agreement which binds the parties.

It is one of the ordinary incidents of a pledge of property to secure the payment of a debt, that it may be sold at public auction after giving notice to the pledgor of the proposed sale, if the debt for which it is security is not paid when it becomes due. The rule and the exceptions to it are stated in *Merchants' National Bank v. Thompson*, 133 Mass. 482, 485. The coupon bonds of corporations for the payment of money, which have a long time to run, and are made payable to bearer that they may be bought and sold in the market, are property of such a nature that, when pledged as security for the payment of promissory notes having a short time to run, the reasonable inference is that the parties intended that they should be sold as pledged property is usually sold if the notes are not paid when they fall due. *Morris Canal & Banking Co. v. Lewis*, 1 Beas. 323. See Jones on Pledges, §§ 71, 727.

In the present case the bonds are payable in ten years from November 1, 1886, with a right on the part of the obligor to purchase or redeem a part of the series issued each year, and to redeem the whole series on November 1, 1891, or on any coupon day thereafter. The notes, which represent either the whole or a part of the debt to secure the payment of which the bonds were given, matured, one on January 30, 1888, the other on June 1, 1888. It is not a reasonable construction of the contract of pledge in this case, that the parties intended that the trust company should be compelled to hold the bonds until they matured or were redeemed, if the notes were not paid at maturity. The

fact that the bonds are the obligations of the debtor is one circumstance to be considered; but it does not outweigh the fact that, to secure the benefit of the security at or near the time when the notes mature, it would be necessary to sell the bonds, and that the right to sell bonds of this character when held as security is one of the rights which a pledgee ordinarily has. We think that as between the parties the trust company has the right to sell at public auction the bonds held as collateral security, and to apply the proceeds to the payment of the notes. Whether it can apply the proceeds to the payment of the bonds it owns, need not be considered. *Bill dismissed.*

HENRY PARKMAN vs. CHARLES J. MCCARTHY.

SAME vs. MARCUS B. MCCARTHY & others.

Suffolk. April 1, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Statutes of Distribution — Illegitimate Child — Next of Kin — Right of Representation — Escheat.

Under the Pub. Sts. c. 135, § 8, cl. 2, providing that an intestate's personalty shall, with certain exceptions, go to those who would take his realty under the Pub. Sts. c. 125, the personal estate of an illegitimate person who died in 1888 is to go to those persons who would take his real estate under § 4 of c. 125, as amended by the St. of 1882, c. 132, and not as that section stood when the Public Statutes were enacted.

If such illegitimate intestate leaves no wife or issue, and no relatives except a brother and sister of his mother and children of her deceased brothers, his personal estate, under the Pub. Sts. c. 125, § 1, cl. 6, will go to the uncle and aunt, to the exclusion of his cousins.

TWO APPEALS from decrees of the Probate Court upon petitions for orders of distribution by the administrator of the estate of William C. McCarthy. Hearing before *Devens, J.*, who reported the case for the consideration of the full court, in substance as follows.

William C. McCarthy, who died intestate on February 6, 1888, leaving no wife or issue, was the illegitimate son of Ann Edwards, who died before him and was the only child of one

Edwards and his wife. After Edwards's death, his widow married Lawrence McCarthy, who had children by her, Mary Walsh and Michael McCarthy, both of whom are living, and John and Lawrence, both of whom died before the intestate, leaving children. The Probate Court made decrees of partial distribution to Mary and Michael, and the children of John and Lawrence appealed to this court.

The questions presented at the hearing were, first, Are the uncle and aunt the only next of kin, or are the children of the deceased uncles entitled to any share as next of kin? and secondly, Does the personal property escheat to the Commonwealth?

H. Parkman, pro se.

J. A. Maxwell, for Mary Walsh.

J. Bennett, for Michael McCarthy.

A. J. Waterman, Attorney General, for the Commonwealth.

J. F. Cronan, for one of the appellants.

F. Burke, for other appellants.

W. ALLEN, J. An illegitimate person died intestate in the year 1888, leaving no wife, issue, or mother. A brother and a sister of his mother, and children of deceased brothers of his mother, survived him. The questions presented by the report are, whether his personal estate escheated to the Commonwealth, and, if it did not, whether the children of the deceased brothers of his mother are entitled to any share of it.

The statute of descents (Pub. Sts. c. 125, § 4) provided that, if an illegitimate child died without issue who could inherit his estate, it should descend to his mother. This was amended, in less than two months after it took effect, by the St. of 1882, c. 132, by adding the words, "or in case she is not living, to the persons who would have been entitled thereto by inheritance through his mother if he had been a legitimate child." Under this statute, the kindred of his deceased mother would inherit from him as if he had been her legitimate son; they are made his kin through her, and they inherit from him, and not from her. As the intestate in the case at bar left no father or mother, brother or sister, and no issue of any deceased brother or sister, his real estate would descend to his next of kin in equal degree. Pub. Sts. c. 125, § 1, cl. 6. The St. of 1882, c. 132, makes the brothers and sisters of his mother his kin, and they would take

his real estate to the exclusion of the children of her deceased brothers, who are one degree farther removed. *Conant v. Kent*, 180 Mass. 178.

By the statute of distributions, (Pub. Sts. c. 135, § 3, cl. 2,) personal estate of an intestate "shall be distributed among the persons who would be entitled to the real estate by chapter one hundred and twenty-five, and in the same proportions as there prescribed," with exceptions which need not be noted. The question is, whether chapter 125 of the Public Statutes, as it was originally enacted, or as it is amended by the St. of 1882, c. 132, is to govern the distribution of the personal estate. We think that when the Public Statutes, in c. 125, provided for the descent of real estate, and in c. 135 for the distribution of personal estate to the persons who would be entitled to the real estate under c. 125, the intention was to refer to the latter statute, as from time to time it might be amended. Chapter 125 is entitled "Of the descent of real estate," and the reference to it as c. 125 may well be intended to be a reference to the statute of descents.

The manifest intention of the Legislature has been, that, with specific exceptions, the personal property of an intestate should go in the same direction as the real estate. The form has been the general adoption of the enactments concerning the descent of real estate into the statute concerning the distribution of personal property. Formerly, the provisions were contained in the same chapter or section. See St. 1783, c. 36; St. 1789, c. 2; St. 1805, c. 90. They appear in separate chapters in the Rev. Sts. cc. 61, 64. The Gen. Sts. c. 94, § 16, cl. 3, are the same in substance as the Pub. Sts. c. 135, § 3, cl. 2, the reference being to chapter 91 of the General Statutes. When the St. of 1876, c. 220, repealed the Gen. Sts. c. 91, § 1, and substituted a statute of descents materially different from that, it amended the Gen. Sts. c. 94, § 16, cl. 3, by adding, after the reference to c. 91, the words, "or by any acts in amendment thereof, or in addition thereto." This provision seems rather declaratory than remedial, and indicates the intention of the Legislature to prevent any doubt which might have arisen from the repeal of the former statute that distribution was to be according to the existing statute of descents. The St. of 1876, c. 220, was amended in regard to the descent of real estate by the St. of 1880, c. 219, and that

amendment was incorporated into the Pub. Sts. c. 125, § 1. In treating it as applicable to the distribution of personal property by the reference in c. 135, as well as by omitting § 4 of the St. of 1876, c. 220, in regard to amendments to the chapter referred to, there does not appear to have been any intention to change the law.

We think that the personal estate is to be distributed, not to the persons to whom the real estate would have descended by the Pub. Sts. c. 125, as it stood at the time of the enactment of the Public Statutes, but to the persons who would take the real estate under the statute as it stood at the time of the death of the intestate, and that the brother and sister of the mother of the deceased take, to the exclusion of the children of her deceased brothers.

Decrees affirmed.

FRANCIS J. STRATTON & another vs. PHYSIO-MEDICAL
COLLEGE & others.

Suffolk. April 2, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Public Charity — Cy Pres — Costs.

A testator provided by his will that a part of the net income of a trust fund was "to be paid semiannually to the trustees of the Physio-Medical College of Cincinnati, Ohio, to be used by the college for the promotion of the medical art, as believed in and favored by me during my lifetime, and in support of that institution, as the trustees thereof shall from time to time determine." There was no corporation of that name of which C., at whose instance the legacy was given, was president or director, as the testator erroneously supposed, but there was an unincorporated medical school in that city conducted under that name by C. for private profit, and devoted to the form of medical art believed in by the testator, in which C. lectured and taught, alone or with others; and it was this school, which ceased to exist at C.'s death, that the testator meant. A corporation called the Physio-Medical Institute, established at that place, claimed the gift. *Held*, that the gift was not a public charity; that the gift failed with the donee named; and that costs could not be allowed to the last named corporation out of the fund.

HOLMES, J. This is a bill in equity, filed June 19, 1882, brought by the son and widow of John Stratton, who allege themselves to be his heirs at law, to obtain a decree that one

fourth of the income of the residue under such will, directed by him to be paid to the trustees of the Physio-Medical College of Cincinnati, Ohio, be paid to the plaintiffs, on the ground that there is no such institution. The words of the will are, "one quarter part of the net income is to be paid semiannually to the trustees of the Physio-Medical College of Cincinnati, Ohio, to be used by the college for the promotion of the medical art, as believed in and favored by me during my lifetime, and in support of that institution, as the trustees thereof shall from time to time determine, the same to be paid to the treasurer of the institution duly authorized."

The master reports, that the testator supposed that there was a corporation of the name used by him, of which one Curtis, at whose instance he gave the legacy, was president or director; that in fact there was no such corporation in existence at the testator's death, but that Curtis lectured and taught, alone or with others, under that name; and that Curtis's medical school was the one meant. This school ceased to exist at Curtis's death, in 1881.

The income is claimed by a corporation called the Physio-Medical Institute, established at Cincinnati. Assuming that it would be possible for that corporation to take a gift to the Physio-Medical College, (*Hinckley v. Thatcher*, 139 Mass. 477, and *Tucker v. Seaman's Aid Society*, 7 Met. 188, 209,) it could not do so in the absence of evidence appropriating to it a name which on its face denotes a different body. *Minot v. Boston Asylum and Farm School*, 7 Met. 416. *American Bible Society v. Pratt*, 9 Allen, 109. But the evidence has not that effect, and the master finds that the name in the will does not mean the Physio-Medical Institute. We do not think that the claim of this defendant had sufficient ground to warrant the allowance of its costs out of the fund.

The plaintiffs have argued that the income should not be applied *cy pres*. The Attorney General, who has been made a party defendant, makes no argument that it should be so applied. The attempt of the Physio-Medical Institute to raise the question by an amendment to its answer was disallowed, and it did not seek to reopen the matter at the hearing before us. In the absence of argument, we see no sufficient reason for directing a scheme to be framed.

In the first place, it does not appear that the will creates a public charity. It does not purport to found an institution, as in *Tainter v. Clark*, 5 Allen, 66, *Attorney General v. Lonsdale*, 1 Sim. 105, and *Russell v. Allen*, 107 U. S. 163, but to give the fund to one already in existence, and having a determinate character. It would seem that neither Curtis's medical school in fact, nor the supposed corporation in the mind of the testator, was a free or public school, as in *Boxford Religious Society v. Harriman*, 125 Mass. 321, and *Morville v. Fowle*, 144 Mass. 109, (see *McIntire v. Zanesville*, 17 Ohio St. 352,) but that they were both private pecuniary enterprises, to the support of which the trustees, that is to say, the parties interested, had power to apply the whole income. Such an enterprise is not a public charity, even if indirectly it serves charitable ends. *Attorney General v. Hewer*, 2 Vern. 387. *Attorney General v. Newcombe*, 14 Ves. 1, 7. *Attorney General v. Haberdashers' Co.* 1 Myl. & K. 420. See *Drury v. Natick*, 10 Allen, 169, 180; *Carne v. Long*, 2 DeG., F. & J. 75, 79; *Thomson v. Shakespear*, 1 DeG., F. & J. 399, 406, 408. If the will allows the fund to be applied to purposes not charitable, the gift fails as a charity. *Rotch v. Emerson*, 105 Mass. 431, 433. *Saltonstall v. Sanders*, 11 Allen, 446, 464. *Morice v. Bishop of Durham*, 9 Ves. 399, 406. *Ellis v. Selby*, 1 Myl. & Cr. 286, 299.

In the next place, we think that it appears from the facts that the gift is primarily to the trustees of the college, and that the college is in another State, that the income is to be used by the college, and that the whole of it may be used for its own support in the discretion of the trustees, as well as from the circumstances under which the will was made, that the main object is the support of the particular institution which the testator had in mind, and that the promotion in Ohio of Thompsonianism, the form of medical art believed in by the testator, was to be accomplished as incident to that object. It is immaterial to this conclusion whether the name described an existing beneficiary or not. At least it described an institution which was supposed by the testator to exist, and of which his friend was supposed to be an officer. The testator's belief as to facts has the same effect upon the construction of his language, whether his belief was right or mistaken.

Then, if the foregoing construction of the will is not too strict, even if the gift were to a public charity, probably the gift would fail upon the failure of the donee. The main doubt, if it were conceded that the gift was charitable, would arise on the question of construction. In such cases courts have gone very far in discovering and sustaining a general charitable intent distinct from the means indicated for carrying it out, or the immediate object. *Incorporated Society v. Price*, 1 Jon. & Lat. 498, *S. C.* 7 Ir. Eq. 260, and other cases cited in *Jackson v. Phillips*, 14 Allen, 539.

Thus, in case of a simple gift to an institution, if the institution is in its nature, and by its name appears to be, a mere trustee or conduit for the application of its funds to charitable purposes, the gift will not fail upon failure of the donee. *Winslow v. Cummings*, 3 Cush. 358. *Bliss v. American Bible Society*, 2 Allen, 334. *Old South Society v. Crocker*, 119 Mass. 1, 24. See *In re Maguire*, L. R. 9 Eq. 632. So *a fortiori*, if the objects of the charitable trust are declared by the will, and it appears that the discretion of the particular societies named is not of the essence of the gift. *Reeve v. Attorney General*, 3 Hare, 191, 197. *Marsh v. Attorney General*, 2 J. & H. 61. But if the construction of the will is settled in the sense in which we have construed the one before us, then if the donee fails, the gift fails. To that extent, at least, we may follow the late English cases with safety, and without encountering the doubts expressed in *Jackson v. Phillips*, 14 Allen, 539, 594, and 1 Jarm. Wills, (Bigelow's ed.) 247, 248. *Clark v. Taylor*, 1 Drewry, 642. *Russell v. Kellett*, 3 Sm. & G. 264. *Marsh v. Means*, 5 W. R. 815; *S. C.* 3 Jur. (N. S.) 790. *Langford v. Gowland*, 3 Giff. 617. *Fisk v. Attorney General*, L. R. 4 Eq. 521. *In re Maguire*, L. R. 9 Eq. 632. *Minot v. Baker*, 147 Mass. 348, 349, 350. See *Cherry v. Mott*, 1 Myl. & Cr. 123, 133; *Smith v. Oliver*, 11 Beav. 481; *Coldwell v. Holme*, 18 Jur. 396, 397; Tudor, Charities, (2d ed.) 225 *et seq.* And even if the donee is in existence at the date of the will, there is no absolute rule of law that prevents the charity terminating when the donee ceases to exist, although, no doubt, in such cases courts have gone still further in straining the meaning of wills, in order to uphold the supposed general intent. *Clark v. Taylor*, 1 Drewry, 642. *Russell v. Kellett*, 3 Sm. & G. 264. See *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Baker v.*

Clarke Institution, 110 Mass. 88, 91. The favor shown to charities should not be carried to the point of overriding the plainly expressed limits of a gift, whether the duration is limited in so many words or not.

As the fund in question is a part of the residue, it goes to the heirs at law and next of kin of the testator, as undevised property. *Sohier v. Inches*, 12 Gray, 385. *Lombard v. Boyden*, 5 Allen, 249. *Smith v. Haynes*, 111 Mass. 846. *Cummings v. Bramhall*, 120 Mass. 552, 558. *Skrymsher v. Northcote*, 1 Swanst. 566, 570. *Humble v. Shore*, 7 Hare, 247, 249.

Decree for the plaintiffs.

A. A. Ranney, (*F. Ranney* with him,) for the plaintiffs.

A. Fiske, (*J. Wilby* of Ohio with him,) for the Physio-Medical Institute.

H. C. Bliss, First Assistant Attorney General, for the Attorney General, submitted the case without argument.

MIDDLESEX COMPANY vs. CITY OF LOWELL.

Middlesex. April 3, 1889. — June 20, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

*Nuisance — Mill-Pond — Sewer — Adverse Possession — Prescription
— Equity Practice — Decree.*

A city, in 1842 and 1871, built sewers so as to discharge into a mill-pond, which, however, before the public introduction of water into the city, in 1878, carried very little beyond surface water into the pond, but from that time added constantly, materially, and appreciably to a noxious deposit in the bottom of the pond, a part of which came from other sources, and to unhealthy gases arising from it. In 1884 the owner of the pond brought a bill in equity against the city to stop such discharge and to cause the removal of the deposit. *Held*, that the city had gained no right by prescription so to discharge the amount then discharged by it into the pond, and that such owner was entitled to a decree. *Held*, also, that the city should have a reasonable time to enable it to comply with the decree, and should not be compelled to remove the whole of the deposit.

BILL IN EQUITY, filed April 26, 1884, to restrain the defendant from filling the plaintiff's mill-pond, and to compel it to remove

noxious material already deposited in the pond. Hearing upon the pleadings and a master's report, before *Holmes, J.*, who at the request of the parties reserved the case for the consideration of the full court, in substance as follows.

The master's report contained the following facts. The plaintiff, a mill corporation, was the owner of the mill-pond in question, which was situated on the Concord River and was raised by its dam, and of the land under the pond, and from its organization in 1823 had constantly used the water power thus created for manufacturing and other purposes. In 1842 the defendant city caused to be constructed a main sewer in Andover Street, and in 1871, another in Church Street, so as to discharge into the plaintiff's mill-pond. From time to time other sewers were constructed by the defendant in adjoining streets, covering a large section of the city, which discharged into these main sewers. Before 1873 these sewers for the most part carried surface water from these streets into the pond, mingled with sand only, and very little if any house sewage went into the pond. Since the public introduction of water into the defendant city, in that year, and its general use in houses along the line of these sewers, a constant and appreciable amount of house sewage of a noxious character has passed through them into the pond.

After the filing of the bill, the defendant had completed a sewer, which intercepted the Church Street sewer, and caused it to discharge below the plaintiff's dam and pond.

The water of the plaintiff's pond was formerly used for drinking, as well as for manufacturing purposes, but for fourteen years at least had been used by the plaintiff for the latter purposes only. The bottom of the plaintiff's pond is to a large extent covered with a deposit, varying from ten to thirty inches in thickness, composed of sand and sewage matter discharged from the defendant's main sewers, and of refuse brought down the stream from other sources. The discharge from the Andover Street sewer and the Church Street sewer had contributed, and the discharge of the former now contributes constantly, materially, and appreciably to the amount of this deposit, and to the volume and unhealthy nature of gases generated by it. The odors from the pond were perceptible as early as 1872, and the trouble has gradually but very slowly grown worse every summer since that time.

If, upon these facts, the plaintiff was not entitled to relief, the bill was to be dismissed; otherwise, an injunction was to issue restraining the defendant from discharging the sewage into the pond, and an order was also to issue that such material in the pond be removed by the defendant.

B. F. Butler & P. Webster, for the plaintiff.

F. T. Greenhalge, for the defendant.

HOLMES, J. The defendant has built sewers which discharge into the plaintiff's mill-pond, and which contribute constantly, materially, and appreciably to a deposit at the bottom of the pond, and to unhealthy gases which arise from the deposit. It does not appear that the defendant ever took any part of the plaintiff's land or of its water rights by eminent domain, or that it acted under any statute. It follows that the plaintiff is entitled to the injunction, unless the defendant has acquired a prescriptive right to discharge through its sewers upon the plaintiff's land substantially the amount which it now discharges there.

As to that, the causes of the nuisance in its present form, so far as the defendant is responsible for them, existed only to a very small extent, if at all, before the public introduction of water, in 1873, and the trouble has been slowly growing worse ever since that time. It is suggested, that, when the first sewer was built, in 1841, the plaintiff might have contemplated the present result. But at that time there was no water. And further, prescriptive rights are measured by the extent of the actual adverse use of the servient property, not by the extent of the threats of the dominant owner. *Kenison v. Arlington*, 144 Mass. 456, 457, 458. *Horner v. Stillwell*, 6 Vroom, 307. See *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. 349, 352. It was not argued that the plaintiff was estopped by the fact that it did not seek for an injunction when the sewer first was built. *Morse v. Worcester*, 139 Mass. 389, 392.

The plaintiff is entitled to an injunction. *Boston Rolling Mills v. Cambridge*, 117 Mass. 396. *Haskell v. New Bedford*, 108 Mass. 208. If it should be necessary to allow a reasonable delay in order to enable the defendant to comply with the order of the court, that will be considered by the single justice in framing the decree. *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146. It does not appear what percentage of the deposits

has been caused by the defendant, but it does appear that only a part of them has been so caused. The burden of removing the whole ought not to be thrown upon the defendant. See *Buddington v. Shearer*, 20 Pick. 477, 479; *Chipman v. Palmer*, 77 N. Y. 51; *Little Schuylkill Navigation Co. v. Richards*, 57 Penn. St. 142; *Wood v. Sutcliffe*, 16 Jur. 75.

Injunction to issue.

LUTHERA MARSH vs. SUPREME COUNCIL AMERICAN LEGION OF HONOR & another.

Suffolk. April 3, 1889. — June 21, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Beneficiary Association — Contract — Change of Beneficiary — Fraud — Waiver — "Family."

A beneficiary association, since the passage of the St. of 1882, c. 195, § 2, enlarging the Pub. Sts. c. 115, § 8, so as to permit such an association to assist widows, orphans, "or other relatives of deceased members," may, upon the application of a member who before that act made his wife his beneficiary, change such designation to his mother.

A member of a beneficiary association took all the necessary steps, so far as he was able, to designate his mother as his beneficiary, instead of his wife, and the association was ready to make the change; but in consequence of the fraud of his wife, acting in collusion with a subordinate officer of the association, the change of designation was not formally effected before his death. *Held*, that the mother was entitled to the fund.

DEVENS, J. The principal defendant is a beneficiary association, incorporated under the general laws of the Commonwealth as they existed in 1879, which are found in the Pub. Sts. c. 115, § 8, and is composed of supreme, grand, and subordinate councils. It carries on its business principally through the subordinate councils, to which applications for membership are made, and through which assessments are levied to provide the necessary funds for its operations. The by-laws of the association require that the name of the beneficiary of a member shall be entered upon the benefit certificate by the supreme secretary of the association, subject to the future disposal of the benefit by the

member. This is done by a petition to the supreme secretary, signed by the member desiring to make the change, attested by the secretary of the subordinate council to which he belongs, with its seal attached and accompanied by a certain fee.

The change is effected by the surrender of the membership certificate, and the issue of a new one payable to the beneficiary designated in the petition. In 1880, Walter H. Marsh became a member of a subordinate council, and received a benefit certificate in the sum of two thousand dollars, payable to his sister. After the issue of the certificate to him, Marsh duly caused it to be changed so as to be payable to his wife, Emeline S. Marsh, the other defendant. In 1887, in order to substitute his mother, Luthera Marsh, as beneficiary of the fund, he first caused his certificate to be delivered to the secretary of his subordinate council to be forwarded to the supreme secretary. He then signed a petition in due form to the supreme secretary, and filed it, together with the requisite fee, with the subordinate secretary, supposing that his certificate was at that time in the possession of such secretary. With the intent to prevent the change from being made, and acting in collusion with Emeline S., the subordinate secretary, instead of forwarding the certificate, as it was her duty to do, had delivered it to Emeline S., and with the same intent she had neglected to affix the seal of the subordinate council to the petition and to attest it. The subordinate secretary subsequently handed the petition, without such seal and attestation, to the supreme secretary, who performed all the acts necessary to waive the seal and attestation, as he had the right to do. The change in the designation of beneficiary was not effected by reason of the fraudulent acts of the subordinate secretary and of Emeline S., but would have been made by the defendant association, had it received the benefit certificate. Walter H. Marsh died on April 28, 1888, and the certificate remained in the possession of Emeline S. Marsh.

The questions presented by the report are, whether he was entitled thus to substitute his mother as beneficiary of the fund, and whether, in view of the steps taken by him in order to make this substitution, and of the fact that it was not actually effected by reason of the conduct and acts of Emeline S. Marsh,

which prevented the issuance of a new certificate, the plaintiff is entitled to the same benefit as if the substitution had been made. The corporation admits its liability, and is ready to pay the amount of the benefit to whoever may be held lawfully entitled thereto.

The association had authority by the statute, as it existed when it was formed, to establish a fund "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." The statute of 1882, c. 195, enlarged the powers of such associations by adding to the persons therein described "other relatives of deceased members." The constitution and by-laws of the defendant association have been republished since the act of 1882, without alluding to or noticing that statute. Whether this republication included any alterations does not appear. This statute did not require formal adoption by a beneficiary corporation, and it was therefore held, that when, after its passage, such association accepted the application of a person with a designation of a beneficiary that could only lawfully be made by virtue of the later statute, it could not be said by it, or by any claimant of the fund, that it was exercising, and was only authorized to exercise, the more limited powers which it had under the earlier statute. *Massachusetts Catholic Order of Foresters v. Callahan*, 146 Mass. 391, 393.

In the case at bar, the certificate was issued to the member, and thus the contract made with him, previously to the statute of 1882, with the assent of the member and the corporation; and there is no reason why the class of beneficiaries from whom he might select should not be extended to all mentioned in that statute. Even if the corporation might have refused to allow the wider designation thus permitted, it is found that it did not, and was ready, had the formalities required by it been complied with, to accept Luthera Marsh, the mother of the member, as the beneficiary. Although not dependent upon the member, she was within the larger class of beneficiaries contemplated by the statute of 1882. No person named as beneficiary, among the large class for whose benefit the earlier statute allowed provision to be made, had any such interest in the fund that he or she could object to any change in the disposal thereof in favor of one of the additional class whom the later statute had enu-

merated, if the member so desired, and if the corporation was prepared to assent to it.

In an ordinary life insurance policy made payable to a person named, the rights of the beneficiary are fixed by the terms of the policy, and are vested when the policy is issued. In the certificates of a beneficiary association which are issued to a holder, and which authorize him to designate another beneficiary than the one originally named, the holder may make such changes as the law of the association permits, within the limits of those classes for whom, by statute, such association may provide. All that a beneficiary has during the lifetime of the member who holds the certificate is a mere expectancy, which gives no vested right in the anticipated benefit, and is not property, as, owing to his right of revocation, it is dependent on the will and pleasure of the holder. *Richmond v. Johnson*, 28 Minn. 447. As the beneficiary has only an expectancy, it would seem that a law changing the persons who might be designated to receive the benefits, and enlarging their number, would apply to certificates issued before it took effect, as well as to those subsequently issued. *Masonic Mutual Benefit Society v. Burkhart*, 110 Ind. 189. Where the constitution of a society, which originally provided that a benefit should be paid only to a widow or children, had been legally amended so as to allow the amount to be paid to any one designated in his lifetime by the holder, the person so designated was held entitled to the exclusion of the widow. *Durian v. Central Verein*, 7 Daly, 168.

The defendant Emeline S. Marsh relies much on the case of *Elsey v. Odd Fellows' Relief Association*, 142 Mass. 224. In this case, a member of the association, in his application for membership, designated his wife as a person to whom the benefit was to be paid at his death. A by-law provided that the benefit should be paid "to the person or persons designated by the member, in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family." The member afterwards attempted to change the designation from his wife to his mother, who was not living with him, but who was living with her husband in another town and county. It was held that the attempted designation was invalid, that the original designation to the wife remained in force, and that she

was entitled to the fund. An examination of the papers in the case shows that the attempted change of designation was after the statute of 1882, but no notice of this statute, which allowed the designation of the relatives of deceased members other than their children, was taken in the argument, nor does it seem to have been brought to the attention of the court. It is not alluded to in the opinion, which tests the validity of the designation by reference to the St. of 1877, c. 204, which did not include relatives, and holds that to give the word "family" such a construction as would include his mother not resident with him would make the by-law overreach the scope of the statute, and violate its spirit and purpose. As the attempted designation of the mother was held illegal and invalid, it did not become necessary to consider whether it had been assented to by the corporation.

Remarks similar to these apply to the case of *Tyler v. Odd Fellows' Relief Association*, 145 Mass. 134, 135, also relied upon. The St. of 1882, c. 195, was not discussed in this case, also apparently for the reason that it was held that no designation could lawfully be made to a sister even after that statute, and that on this point *Elsev v. Odd Fellows' Relief Association* was decisive.

In view of the fact that in neither of these cases was the effect of the act of 1882 considered, in giving a wider right of designation than that allowed by the act of 1877 to the certificate holder in corporations formed under that act, they cannot be deemed authority for the proposition that it was not competent for the holder of such a certificate issued prior to that statute with the consent of the corporation thereafter to make a designation in accordance therewith.

It was held, indeed, in *American Legion of Honor v. Perry*, 140 Mass. 580, where a member of such corporation had designated his wife as a beneficiary, who had deceased before him, and had afterwards unsuccessfully sought to dispose of the fund by will, that the fund provided for by virtue of a contract under the statute of 1877 must be divided between those who could be beneficiaries under that statute, to the exclusion of the additional class created by the statute of 1882. It is there, however, clearly inferred that it was in the power of the corporation, after the statute of 1882 took effect, to pass by-laws which would bring

contracts previously made within its provisions, so far as beneficiaries are concerned.

We do not perceive that there is anything in the constitution of the society, or in its by-laws, even if these could not have been waived, which, in the case at bar, would have prevented the member from changing the beneficiary to his mother. That change, it is found, the corporation was entirely ready to make, according to its rules, upon the surrender by Walter H. Marsh of his benefit certificate. Even if it had not formally accepted the statute of 1882, it was prepared to act under it, and avail itself of the larger powers thereby conferred. The certificate holder and the corporation were the only contracting parties, and there is no reason why they could not modify their contract at their own pleasure, so long as they were within the limits allowed by law. The constitution and by-laws of the company are to be construed with the statutes. It is not to be inferred from accidental changes in the phraseology that the corporation is seeking to exercise powers that do not belong to it, or that it does not desire to avail itself of the privileges which have been conferred upon it. The object of the society is declared, among others, in its certificate of incorporation and in the articles of its constitution, to be the payment of a benefit fund on his decease to "the family, orphans, or dependents, as the member may direct." The word "family," which is not found in the statute, would have included as such then only the widow and orphans, who are there named. When the words "other relatives of deceased members" are introduced after these by the later statute, the word is sufficiently flexible to include them. One of its well-known meanings in common use includes as such relatives who are descendants of a common ancestor. See Worcester's Dict. and Webster's Dict., *Family*.

The by-laws (Law III. Benefit Certificates) of the corporation provide, in § 2, that applicants shall enter upon their application the name or names of the members of their family, or those dependent upon them, to whom they desire the benefit paid; and in § 3, that "members may at any time, when in good standing, surrender their benefit certificates and have new ones issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct," etc. It is argued that from these two sections

it appears that the right of the member to nominate the beneficiary named in his original certificate of membership is greater than the right which his contract conferred upon him thereafter to change his beneficiary, and that while he may originally nominate any member of his family for whom provision can lawfully be made, he can change the beneficiary only by designating some one dependent upon him. But there was no intent thus to limit the right to change. The word "dependents," in the second clause, is used to describe all who may be beneficiaries. This is seen by reference to the prescribed form of petition which accompanies § 3, above referred to, and which concludes, "The relationship or dependence must be clearly stated in the application or notice of change." It is thus recognized that relatives may properly be beneficiaries, nor do we find any restriction upon the power of the corporation to make any substitution which the member who has contracted with it requests, within the classes for whom the law has provided.

Even if a change in the beneficiary could legally have been made to the mother, the defendant Emeline S. Marsh contends that, as this was never perfected by the assent of the corporation, she is entitled to the benefit fund and to an order on the corporation to pay it to her. The petition for the substitution to the supreme secretary should have had the seal of the subordinate council, and been attested by the subordinate secretary. The forwarding of the petition with the necessary formalities was properly the work of the secretary of a subordinate council, a ministerial officer only, and the want of these formalities could, as matter of law, be waived by the officer to whom it was addressed, and were in fact waived. Deficiencies in the performance of the details provided for the transmission of a document were unimportant, when the officer to whom it was addressed was satisfied of its authenticity. Everything that Marsh was to do, or could do, to effect the designation in favor of his mother, had been done. He could not be responsible for the failure of the subordinate secretary to affix the seal, attest the petition, or forward the benefit certificate. It is found that the change was not made by reason of the fraudulent acts of the subordinate secretary and of Emeline S. Marsh, and would have been made by the defendant corporation if it had received the benefit certifi-

cate. If Walter H. Marsh had a right to make this change, and could and would have made it but for the fraudulent conduct of Emeline S. Marsh acting in collusion with an officer of the defendant corporation, she certainly cannot thereby have entitled herself to the amount of the benefit fund which she has demanded. It should go to the party whom Walter H. Marsh had substituted as his beneficiary, so far as his act could do it, and who to-day would be in possession of the proper evidence upon which she could make her demand upon the corporation but for the fraud which has been practised. The controversy is solely between these two claimants. It is a matter in which the corporation has no interest. It desires only that a decree may be rendered that shall conclude these claimants as to any demands upon it.

A decree should, therefore, be rendered commanding the defendant Emeline S. Marsh to produce and surrender to the corporation the certificate of the membership of Walter H. Marsh, and that the defendant corporation be required to pay to the plaintiff the amount that would have been due on the death of Walter H. Marsh upon the benefit certificate, had one been actually issued, in lieu of the one which he sought to surrender, deducting therefrom such reasonable costs for its necessary appearance in this suit as may be determined by a single justice.

Decree accordingly.

W. C. Cogswell, for the plaintiff.

W. Howland, for Emeline S. Marsh.

W. S. Stearns & J. H. Butler, for the beneficiary association.

JAMES W. NEWELL vs. PAUL WEST.

PAUL WEST vs. JAMES W. NEWELL.

Norfolk. March 27, 1889. — June 25, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Estate of Deceased Person — Widow's Allowance — Administrator — Accounting — Equity Practice and Pleading — Master — Attorney's Lien — Set-off — Alabama Claim — Probate Court.

The question whether an allowance to a widow from her husband's estate was properly made by the Probate Court is not open upon a hearing on the administrator's account.

The findings of a master to whom a probate appeal is referred cannot be set aside without definite proof of error, but must be treated as having substantially the weight of the verdict of a jury.

An administrator was allowed by a master, to whom a probate appeal as to his account was referred, the amount of an allowance to the intestate's widow retained by him under an agreement with her in return for valuable services rendered to her by him; the rent of an office, necessarily hired by him for the exclusive use of the estate owing to the large mass of books and papers belonging to it; payments made by him for services performed for him as administrator in the prosecution of claims belonging to the estate; for his services and commissions as administrator; and for services rendered by him to the intestate before his death. *Held*, that the items were properly allowed.

An agreement between an attorney at law and his client for the payment of a certain sum for the former's professional services in prosecuting Alabama claims of the client, recited that the sum agreed upon "should in some form be charged upon or paid out of any sums to be recovered on the Alabama claims." *Held*, that there was no effective assignment to the attorney of any right in those claims, and that, even if there were, § 3477 of the U. S. Rev. Sts. would be a bar.

An administrator, who, as such, receives the amount of an award of the Court of Commissioners of Alabama Claims upon a claim in favor of his intestate, cannot assert a lien thereon for services rendered by him as an attorney at law to the intestate prior to his death in the prosecution of the claim; nor, if the estate be insolvent, can he set off his claim for such services against such amount.

Money paid by the United States out of the Geneva Award upon an Alabama claim created by the U. S. St. of June 5, 1882, is in the nature of a gratuity, and does not pass to an assignee in bankruptcy appointed under proceedings instituted prior to the passage of that act.

An administrator who has resigned his trust is not to apply to commissioners in insolvency appointed under the Pub. Sts. c. 187, § 2, to prove a debt due him personally from the estate, when its amount may depend entirely upon the relation in which he stands to the estate, but must present his claim to the Probate Court under the Pub. Sts. c. 136, § 6.

The date of a decree of the Probate Court as recited therein cannot be controlled by other evidence upon an appeal from the decree; but the party aggrieved should apply to that court to correct the mistake or error, if any.

DEVENS, J. These are appeals from a decree of the Probate Court for Norfolk County, upon the account of Paul West, administrator of Isaac Taylor. The first case is the appeal of Newell, the administrator *de bonis non* of Taylor, appointed after West had resigned as administrator, because certain items had been allowed said West by the Probate Court. The second case is the appeal of Paul West, administrator, because the Probate Court had disallowed certain claims made in his account as administrator of Taylor. These appeals have been heard by a justice of this court upon the report of the master to whom they were referred, and upon the exceptions of the parties thereto, and the master's report has been confirmed. No evidence was offered before the master, in either case, except that which was pertinent to and which bore upon the reasons of appeal as filed in the Probate Court. These reasons may be considered substantially in their order, commencing with those of Newell.

The first reason of appeal presented is, that West should not have been allowed the sum of \$1,500, the allowance made to the widow of the intestate, because the same was never actually paid to her by West. It is found that the widow had agreed that this sum should be retained in return for valuable services rendered her by West upon her own account; that she had made no claim for it upon Newell, the present administrator; and that the agreement made by her with West was a reasonable and proper one. It was correctly ruled by the master, that the question whether the allowance to the widow should have been made by the Probate Court was not open in a hearing upon the administrator's account, and that upon the above facts West was entitled to this allowance.

The second reason of appeal is, that West should not have been allowed and credited with the sum of \$472 50 for the rent of an office hired by him exclusively for the business of the estate; but as it appears by the report that the hiring of said office was reasonable and practically necessary in view of the large mass of books and papers belonging to the estate, this allowance was properly made.

The third reason of appeal is on account of the allowance to West of certain payments made by him for services performed for him as administrator in the prosecution of Alabama claims,

so called, belonging to the estate. They are found to be reasonable and valuable, and that it was requisite to obtain them in order that these claims should be properly pressed. They were therefore properly allowed.

The fourth reason of appeal is from an allowance by the Probate Court of the sum of \$3,346.91 to West for the services and commissions of West as administrator, upon the ground that the amount was excessive, and that he was unfaithful in his trust. While the evidence is not reported, much was offered before the master as to the extent and value of West's services. It appeared that the affairs of Taylor at the time of his death were widely extended and in a very confused state, that very important services were rendered by West, especially in the prosecution of the Alabama claims, and that he was not unfaithful in the performance of his trust. Upon the evidence, the master has found as a fact that the services of West as administrator were of the value of \$4,000, the sum originally claimed by him. This finding, as well as those which we have previously considered, is not shown in any way to be erroneous, nor can it be set aside as such without definite proof of error, but must be treated as having substantially the weight of the verdict of a jury. *Trow v. Berry*, 113 Mass. 139. *Richards v. Todd*, 127 Mass. 167, 172.

The fifth reason of appeal, by Newell, was waived, and need not be considered.

The sixth reason of appeal, by Newell, is on account of an allowance to West by the Probate Court of \$6,240.16, not as a credit upon his account, but as a debt due from the estate to him for services rendered to Taylor before his death, which allowance is to be added to the list of debts proved before the commissioners of insolvency appointed to pass upon claims against the estate, which had been represented insolvent. Upon this item the master allows a larger sum, to wit, \$16,000.

An item for services rendered by West to Taylor previous to his death, to the amount of \$25,000, was inserted by West at or near the close of the hearing before the Probate Court, but each party had full opportunity to offer evidence in relation to it. It may be conveniently considered in connection with the first and fourth reasons of appeal, as alleged by West; one being that he

was wrongfully charged with an amount of \$13,338.71, with interest thereon, received by him as one of the Alabama claims, for a vessel of Taylor destroyed by exculpated Confederate cruisers, so called, which amount West claimed to hold as of right as his own; the other being for the failure of the Probate Court to allow him the sum of \$12,480.31 as a lien or claim on the money received from the Alabama claims upon an alleged express agreement that the sum of \$15,000 should be paid to him from this fund. It appears that West rendered valuable services for several years previous to Taylor's death in the prosecution of the Alabama claims, and that an agreement in writing was made by which the sum of \$15,000 was fixed on as the value of West's services, and "that that sum should in some form be charged upon or paid out of any sums to be recovered on the Alabama claims." But there was no evidence of the manner "in which said agreement provided that said West should obtain his pay from said claims," if it did thus provide, "whether by an assignment of the claims, or by Taylor's agreeing to set aside and hold \$15,000 out of said claims for the payment of West, or by declaring that said West should have a lien upon said claims to the amount of \$15,000." West contended that, the sum of \$13,338.71 of the proceeds of the Alabama claims coming into his hands as administrator, he had a right to appropriate the same to the payment of his claim for \$15,000, and also that he had a lien upon the amount received for his professional services.

It was held by the master, that, in view of § 3477 of the Revised Statutes of the United States, West could not "maintain his said claim under the said agreement with Taylor to appropriate said \$13,338.71 to his own use, without deciding whether said claim could be maintained were it not for such provisions of the statutes of the United States, and also that he could not maintain his claim upon the second ground, of claim for a lien for his professional services." It was held by the justice of this court who rendered the decree appealed from, that "the evidence and findings contained in the master's report do not show that there was any such distinct assignment to said West of a part of the moneys to be received from the Alabama claims as would convey to said West the title thereto, independently of

the question whether an assignment of such moneys would not be void under § 3477 of the Revised Statutes of the United States, neither do the evidence and findings show that said West had a lien thereon."

Without at this moment discussing the construction placed by the master on § 3477 of the Revised Statutes of the United States, it appears clear that there was no effective agreement by which any assignment or transfer was made to West of any right in the Alabama claims. An agreement by one that he will pay another when he shall himself collect a particular debt, is not an assignment of any interest therein. One form in which it is stated that the alleged contract may have been made by which West was invested with a right to appropriate the fund is, that Taylor agreed that he would hold it and pay West therefrom. Independently of the statutes of the United States, such an agreement would not authorize a payment to West of any portion of the debt due to Taylor, so as to discharge the debtor. Such a case is quite distinguishable from *Pinch v. Anthony*, 8 Allen, 536, relied on by West, where it was expressly agreed, not merely that a party advancing money on lands should have an interest in the proceeds thereof when sold, but that the amount due should be "a charge on the joint estate of the parties, in proportion to their respective interests."

That there was no definite agreement that any part of the sum recovered on account of the Alabama claims was to be transferred to West, but that there was at most only an indefinite expectation that he would be paid from the proceeds when Taylor should realize the Alabama claims, appears strongly from West's own conduct. He never personally received the fund as the attorney of Taylor, so that he could assert any individual rights therein; he received it as the representative of the estate of Taylor, and as due to that estate, as appears by his acknowledgment of the date of November 8, 1884, which recited that he received \$13,338.71, "in full settlement of the amount due the estate of Isaac Taylor, as the estate's proportion by agreement of the judgment of the Court of Commissioners of Alabama Claims," and as the representative of that estate he must account for it. He had previously inventoried the Alabama claims as a part of Taylor's estate. He had

signed and sworn, as administrator, to the petition to the Court of Commissioners of Alabama Claims for the collection of the claim from which the \$13,838.71 was received, representing it to be a part of Taylor's estate, alleging that there had been "no assignment or transfer of the whole or any part of said claims to any person or corporation whatsoever. He had also, as administrator, expended the funds of the estate in its collection, and in a deposition made in aid of the prosecution of the claim had testified that there had been no assignment or transfer, in whole or in part, of this claim.

We are of opinion, also, that the master correctly ruled, that if a transfer of the claim, or part of it, or of a right therein, had been proved, § 3477 of the Revised Statutes of the United States would operate as a bar to the claim of West. It declares "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, . . . shall be absolutely null and void," unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim and the ascertainment of the amount due.

In *Spofford v. Kirk*, 97 U. S. 484, the language of this section was considered. "It would seem to be impossible," says Mr. Justice Strong, in delivering the opinion of the court, "to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." In *United States v. Gillis*, 95 U. S. 407, the court had held that under this statute the assignee of a claim had no standing to prosecute it in any court, or at the Treasury Department, against the government, but was not then called upon to decide whether such assignments were invalid as between the assignor and assignee. In *Spofford v. Kirk*, *ubi supra*, it was held that this section was intended to render all claims against the government inalienable, alike in law and equity, for every purpose and between all parties, and that it could not be said, when the statute declares all transfers or

assignments of the whole of a claim, or any part or interest therein, "shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government."

Nor, irrespective of any agreement with Taylor, can West assert any attorney's lien on the sum collected for his services, which is the ground of his claim to \$12,480.31 of the money paid to him. If, before the death of Taylor, West had received moneys belonging to him, which, in the ordinary course of business, should be paid over to Taylor, his claim for services might be set off against the claim of Taylor. But it would be extraordinary if a creditor of a deceased insolvent debtor, by becoming administrator of his estate, can set off his claim against the assets of the estate which he collects as administrator, and thus obtain full payment of his own debt due from the insolvent debtor, while other creditors obtain their debts only in part, and that part diminished by his preference. West received the amount of the award made on Taylor's claim, not as his solicitor or attorney, but as his administrator, and in that strictly fiduciary capacity. In that capacity, he must account for it; he can assert no claim by virtue of the possession thus acquired to any personal benefit therefrom, to the exclusion of other creditors.

It was also contended by West, that by reason of certain proceedings in bankruptcy by Taylor, instituted on December 3, 1875, he should not be required to account for the sum received by him on account of the Alabama claims as administrator. It appeared that on March 25, 1876, a warrant had been issued to take possession of Taylor's property as that of a bankrupt, and that an assignee had been chosen, who did not accept the trust; but it was not shown that any assignment in bankruptcy had ever been made. From that time, so far as appeared, the whole proceedings had slumbered, and had been practically abandoned. No claim had ever been made on West by any assignee of Taylor in bankruptcy; he had prosecuted the claim as administrator, and the sum had been awarded; and he had received the same as such, no suggestion having been made in the prosecution of the claims of any right in any assignee of Taylor. Although the record does not show a formal closing of the bankruptcy pro-

ceedings, West, who has asserted his right to these claims as administrator, who has received their proceeds as such, and who has never been interfered with by any demand for them, or in his full possession thereof, cannot now assign these proceedings as a reason why he should not account for them. Again, the act of Congress of June 5, 1882, created the only claim which Taylor had upon the fund arising from the Geneva Award. His claim was for damages sustained by what were termed exculpated Confederate cruisers, for the destruction of property by them, and also for war premiums. It was the amount awarded for the former class of these claims which was received by West. These claims have been held to be in the nature of gratuities. No assignee could have acquired any interest in them prior to the act, and even if an assignment had been made in 1876 they would not have passed to the assignee. *Heard v. Sturgis*, 146 Mass. 545.

If West was in error in declining to account for the sum of \$13,338.71, or in asserting a lien on such sum, he asked in the alternative for an allowance for his services rendered to the intestate previously to his death, in the sum of \$25,000. An allowance of the sum of \$6,240.15 was made him by the Probate Court on this demand, to be added to the list of debts proved against the insolvent estate, so that he would thus be entitled to the same dividend thereon as the other creditors. Newell makes the objection, that, as West had ceased to be administrator before he filed his account and before his claim for a debt due from Taylor's estate was presented to the judge of probate, and as such claim must be presented to the commissioners in insolvency on Taylor's estate, the judge had no jurisdiction thereof in the settlement of West's account. At the time of the presentation of West's account, the commission in insolvency was still open, by reason that appeals had been taken from the allowance of certain debts by the commission, and the appeals were still pending. The master heard the evidence, and having found that there was an agreement between Taylor and West, at a particular time before Taylor's death, that West should be paid \$15,000 for his services up to that time, and that such agreement was a fair and reasonable one, and, further, that subsequently to this time West rendered services to Taylor of the

value of \$1,000, found that the sum of \$16,000 was due as a debt to West, to be added to the list of debts as proved before the commissioners of insolvency, so that he should receive the same dividend thereon as other creditors, when one should be declared.

If this was a matter properly within the jurisdiction of the Probate Court, and thus properly before the master, we can see no objection to this finding upon the facts as they are stated, the evidence not being fully reported. It is the contention of Newell, that the Probate Court had no jurisdiction, and thus that this court has none over West's claim for services rendered before the death of the intestate, for the reason that when he presented it he had ceased to be administrator. When an estate of a deceased person is represented insolvent, commissioners are appointed by the Probate Court to examine the claims of creditors, or, if commissioners are not appointed, the court may itself examine the claims, and cause a list of the same, as allowed or disallowed, to be prepared. Pub. Sts. c. 137, §§ 2-4. The Pub. Sts. c. 136, § 6, provide that, if a debt is claimed by an executor or administrator as due to him from the deceased, he shall file in the court a statement of his claim in writing, which may be submitted to arbitrators as therein provided for. If arbitrators are not agreed upon, the judge may himself pass upon the claim. Pub. Sts. c. 136, § 7. *Willey v. Thompson*, 9 Met. 329. It is contended that this applies only to the claim of an executor or administrator who is such when he seeks to prove his claim.

Notwithstanding one has been removed, or has resigned from an executorship, it is still necessary that he should account as executor. Under the Pub. Sts. c. 144, § 2, he would still be obliged to submit himself to an examination, and to answer all questions in relation to his accounts. By voluntarily accepting this trust, his relation to the estate has changed. If he is a debtor thereto, his debt is extinguished, and he is to account for the amount of it as executor. If he is a creditor, he is entitled to credit the amount due to him, and receive it out of the assets. If the estate is insolvent, he cannot indeed receive it in full, as it would be obviously inequitable that he should obtain a preference over other creditors. It was held in *Green v. Russell*, 132 Mass. 536, that an executor having a claim against the

insolvent estate of his testator must present it to the Probate Court, as provided in the Gen. Sts. c. 97, §§ 26, 27, (Pub. Sts. c. 136, §§ 6, 7,) in order that it might determine the validity of his claim, and not to the commissioners in insolvency appointed under the Gen. Sts. c. 99 (Pub. Sts. c. 137). The principal reason for the decision which is there given, that, the claim being made by the executor, there would be no one to control it, would not indeed apply in the case at bar, as the first administrator is now out of office, and there is an administrator *de bonis non*. But in no place except the Probate Court itself can the true relation of one who is or has been the administrator be determined. The claim of West, and its amount, depended upon the question whether he was entitled to retain the sum collected by him as the Alabama award, or to maintain a lien upon it, or whether he was obliged to account for it as administrator. This could not have been passed upon by the commissioners of insolvency; it could only be determined by the settlement of his account in the Probate Court, where the question of his liability to the estate as administrator would be passed upon.

Where one who has been an executor has resigned his trust, or been removed therefrom, he cannot maintain a suit, either at law or in equity, against the administrator with the will annexed, to recover a debt due him from the estate, but his remedy is in the settlement of his accounts of administration in the Probate Court. *Prentice v. Dehon*, 10 Allen, 353. *Munroe v. Holmes*, 9 Allen, 244. In a similar manner, where one has resigned as administrator, he is not to apply to the commissioners of insolvency to prove the debt due him from the estate, when its amount may, as in the case at bar, depend entirely upon the relation in which he stands to the estate. He is to settle his accounts, and, as a part of the settlement, to present his own claim for any debt due to him, whether the estate be solvent or insolvent, to the Probate Court, under the Pub. Sts. c. 136, § 6, that it may there be passed upon by it, or to arbitrators appointed by it. It is to be observed, also, that while the commission of insolvency was actually open when West's account was presented, by reason that certain debts allowed by the commissioners had been appealed from, which appeals were still pending, it would oftener happen that such a commission would

be closed and its time have expired at the time when it would become necessary to investigate the personal claims of an administrator who had resigned, or been removed, and that, unless such claim could lawfully be heard in the Probate Court, there would be no tribunal competent to deal with it.

The result therefore is, that the sixth reason of appeal of Newell, as to any allowance to West for services rendered previously to the death of Taylor, is overruled, and that the allowance of \$16,000 made by the master was properly made, as a debt to be added to the list of claims as allowed by the commissioners, to receive the same dividend as that allotted to other creditors; that as to the first reason of appeal by West, it was properly held that he should account for the sum of \$13,838.71, with interest thereon from the time of its receipt to the date of the final decree, he having wrongfully held it as his own; that as to his fourth reason of appeal, he is not entitled to any lien on the Alabama award as collected.

As to the seventh reason of appeal, by Newell, that West was not charged with interest on a certain sum of \$6,500, it is found by the master that there was no evidence to sustain such a charge, and this finding is affirmed.

The second reason of appeal, by West, is that the Probate Court allowed him \$3,546.91, instead of \$4,000, for his services as administrator, and is disposed of by our affirmation of the decision of the master, considered in connection with Newell's fourth reason of appeal, where it has been held that the sum of \$4,000 was a proper charge for West's services as administrator.

The third reason of appeal, by West, is that two payments made by him to one Sweeney and one Wiswall were wrongfully disallowed. These sums were paid to compromise two claims against the estate made by Sweeney and Wiswall respectively, for services in prosecuting the Alabama claims. These demands are found to have been of such a character that they were properly a subject of compromise, and that such compromise was wise in order to avoid litigation as to claims of a doubtful character. Under these circumstances, the payments made by West should properly be allowed.

The fifth reason of appeal, by West, was that \$25,000, instead of \$6,240.15, should have been allowed him for his services as

attorney rendered Taylor before his death, and was fully considered in connection with the sixth reason of appeal by Newell, where it was determined, upon the finding, that the sum of \$16,000 was the proper sum which West should be allowed as a debt on the list of proved claims.

It is contended by West that there is no decree of the Probate Court, and that the case should be remitted to the Probate Court for further hearing. A first decree, which was never recorded, appears to have been made on March 7, 1888; another upon March 14, which was written out and recorded; and soon after a third one, which, as the master finds, is the one appealed from. While the third decree purports to be of March 7, which was the date of the decree as first drawn, it appears, according to the facts recited, not to have been put into its present shape until after March 14. As against the record of the date of the decree, and to control it so that it shall be held inoperative, this cannot be shown. A party aggrieved should apply to the Probate Court for a remedy, if he has sustained any injury thereby, as by an abridgment of the time within which he would be entitled to appeal. The Probate Court has extensive powers in correcting mistakes and defects in its orders and decrees, except when it would be inconsistent with the very object of the decree thus to review it. *Richardson v. Hazelton*, 101 Mass. 108. *Pierce v. Prescott*, 128 Mass. 140. *Cleveland v. Quilty*, 128 Mass. 578. *Bowers v. Hammond*, 139 Mass. 360. While the decree as originally drawn was modified in important particulars, all matters embraced in the controversy were heard, and the object of the changes made was that such matters should be fully passed upon, so that either party might be protected in his right to review the decision thereon by appeal.

One error in computation appears, which is not included in the reasons of appeal by Newell, administrator, but which, from its purely clerical character, may be corrected in the decree to be rendered here. It is said to have been called to the attention of the Probate Court and master, and would seem to have been accidentally overlooked. The accountant, West, charges himself, in one item of his schedule A, with the "amount of personal estate according to inventory, \$47,780.64." On referring to the inventory as he has returned it, it will be seen that

the accountant has made an error in adding, by which it is \$100 less in amount than if correctly added. The accountant should, therefore, charge himself with \$47,880.64.

With this modification, and with the appropriate changes in the amounts of interest required by the different dates, the decree, as rendered by the justice of this court, is affirmed, and the cases are remanded to the Probate Court for further proceedings.

Ordered accordingly.

W. H. H. Andrews, for Newell.

B. F. Butler, for West.

GEORGE E. BULLARD & another *vs.* SETH CHANDLER
& others.

Suffolk. April 1, 1889.—June 25, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Instructions to Trustees — Devise — Estate for Life — Public Charity.

A trustee has the right to ask the court for instructions as to his present duties only, and not as to what they may be in the future.

A testatrix by her will provided, "I give and bequeath to my friend, the Rev. S. C., of S., the sum of five thousand dollars (\$5,000) which after his death shall revert to the town afore named strictly on this condition, namely, that said town shall support fairly and permanently a Unitarian clergyman, in which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs at law." *Held*, that S. C. was entitled to the income only of that sum during his life.

The testatrix provided that the residue of her estate should "constitute a fund, to be well invested, the income from which I desire my sisters to apply to the relief and comfort of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate; it is strictly for private charities, and may be known to them, as I consider it, as 'the James and George fund,'" referring by these names to her deceased sons; and added, "It is the best monument I can erect for them." *Held*, that the gift was a public charity, which was to be administered by private almsgiving for the poor and unfortunate generally.

BILL IN EQUITY, filed December 11, 1886, by the executors of the will of Mary D. Whitney, for instructions. The case was heard before *Field*, J., who reported it for the consideration of the full court, and was as follows.

Mary D. Whitney died on July 15, 1886, and her will, which was dated February 9, 1884, and was duly admitted to probate, named the plaintiffs as executors and trustees, and, besides many gifts to relatives, including her three sisters and the children of a deceased brother and sister, and to friends and servants, contained the following provisions which are alone material:

"Secondly, I give and bequeath to my friend, Rev. Seth Chandler, of Shirley, the sum of five thousand dollars (\$5,000), which after his death shall revert to the town afore named strictly on this condition, namely, that said town shall support fairly and permanently a Unitarian clergyman, in which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs at law."

After the attestation clause of the will was the following, signed by the testatrix:

"In regard to article secondly, I would add, that in case Rev. Seth Chandler should not outlive me, I wish the sum therein named (\$5,000) to go direct to the town of Shirley for the purpose and on the conditions therein stated."

"Fourteenthly, after the above willed division of my estate, should there be still property remaining, (to which would be added the legacy or legacies of any person or persons named in article twelfthly not living at the time of my decease,) I wish it to constitute a fund, to be well invested, the income from which I desire my sisters to apply to the relief and comfort of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate. It is strictly for private charities, and may be known to them, as I consider it, as 'the James and George fund.' It is the best monument I can erect for them. If, on the contrary, my property should have shrunk so far as to make it impossible to carry out all the above named plans, I wish my sisters, nephews, and nieces to be paid in full, and the remainder to be divided *pro rata*."

The instructions requested, as recited in the bill, were:

"First. Whether the plaintiffs should pay \$5,000 to Seth Chandler as his absolute property, or whether the bequest was for his life only, and if for life only, whether they were to hold and invest such sum, either as executors or trustees, and pay

the income thereof to him, or whether a trustee was to be appointed so to hold and invest it and pay the income.

"Second. Whether said town of Shirley takes any interest in said sum if it should comply with the conditions specified, or whether said sum shall be paid to the heirs at law or distributees of the testatrix, or fall into the residue as disposed of in the fourteenth clause of said will, or what other legal disposition is to be made of said sum.

"Third. Whether they or trustees appointed by the court were to hold and invest the residue of the testatrix's property under the fourteenth clause, and to pay over only the income thereof to the testatrix's sisters mentioned in such clause, and upon what terms and trusts, if any, or whether the principal of the residue was to be paid to the testatrix's sisters, and upon what terms and trusts, if any; and particularly whether the testatrix's sisters were vested with a power only, or whether a power coupled with a trust in favor of definite *cestuis que trust* was created, or a charitable trust, public or private, or what other legal disposition under the terms of the will the plaintiffs were to make of the residue."

The will was wholly in the handwriting of the testatrix. The executors, after the administration of the estate, would have in their hands a residue of over \$125,000 to be disposed of. The testatrix was the widow of George A. Whitney, and had had two children by him; James P. Whitney, who died in September, 1871, at about the age of twenty-four years, and George A. Whitney, who died in November, 1870, at about the age of twenty-two years. At the time of her death she was sixty-eight years of age, and her only heirs at law and next of kin were her three sisters and the children of a deceased brother and sister. The Rev. Seth Chandler is a Unitarian clergyman residing in the town of Shirley, where he was for many years the minister of the First Parish, the only religious society of that denomination in that town. Until 1820 the territorial limits of the parish and of the town were the same. The society owns a meeting-house, and has the benefit of trust funds amounting to \$2,450, the income of which it uses in supporting a Unitarian clergyman. The testatrix was a member of this society with her husband, and was greatly interested in its welfare, and had made it numerous gifts.

The testatrix for many years before her death was an invalid, and lived a secluded life. She left her room or house but very little, and saw but few people. Her constant attendants were three servants, or companions, who lived with her and took care of her, and her visitors were mainly confined to her relatives, a business agent, and an intimate friend, a woman, who also attended to minor business and social matters for her. Her gifts of a beneficent nature were always made directly by herself to the recipient, and she would never give through public institutions, and did not believe in them. These gifts of hers were confined strictly to six persons, and were made for her by her sisters or the friend referred to. Five of these persons were legatees under the will, and were elderly women, being either family friends or former servants, and the donations to them were made by her to relieve their necessities. The sixth person was a young man about twenty-four years of age, a confirmed invalid, whom she never saw, who upon being brought to her notice attracted her sympathy because of a fancied resemblance to her deceased sons. He was not in necessitous circumstances, and her gifts to him were such as would minister to his comfort or pleasure.

H. E. Ware, for the plaintiffs, read the papers in the case.

H. C. Bliss, First Assistant Attorney General, for the Commonwealth.

A. S. Wheeler, for Seth Chandler.

W. H. Atwood, for the First Parish in Shirley.

G. G. Pratt, for the town of Shirley.

W. G. Russell & J. Willard, (*S. S. Shaw*, *G. P. Sanger, Jr.*, *J. O. Shaw, Jr.*, & *M. P. White* with them,) for the heirs at law and next of kin of the testatrix.

DEVENS, J. This is a bill for instructions, filed by the executors of the will of Mary D. Whitney, as to the interpretation to be given to two paragraphs therein, numbered respectively "secondly" and "fourteenthly."

The first of these paragraphs is as follows: "Secondly, I give and bequeath to my friend, Rev. Seth Chandler, of Shirley, the sum of five thousand dollars (\$5,000), which after his death shall revert to the town afore named, strictly on this condition, namely, that said town shall support fairly and permanently a

Unitarian clergyman, in which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs at law."

It is contended on behalf of Mr. Chandler, that he is entitled to have the five thousand dollars paid to him as his absolute estate, upon the ground that the gift to him is absolute in its terms, and that any limitation afterwards is repugnant and void. We are not disposed to question the correctness of the rule, that, where an estate is absolutely given, it cannot be cut down to a less estate by subsequent words inconsistent therewith. *Merrill v. Emery*, 10 Pick. 507, 511. *Sherburne v. Sischo*, 143 Mass. 489. But in determining whether an absolute estate was given, it is important to consider the whole clause by which it was made, and the other portions of the will. It would hardly be contended that, if the gift to Mr. Chandler had been followed by "during his life," or some similar phrase, that the preceding words, which, if they stood alone, would import an absolute gift, could be separated from their immediate context. The word "revert" is obviously used in the sense of "go" or "pass," and the phrase "which after his death shall revert," etc., states that the sum of five thousand dollars is to go to the town of Shirley after his death, as the pronoun "which" can refer to nothing but this sum. Unless Mr. Chandler's estate therein is limited to his life, this could not possibly happen. Again, the testatrix, after providing for the condition, as she terms it, upon which the sum shall go to the town, adds, "in which case all interest accruing on above sum shall be used to aid in payment of his salary, failing which it shall revert to my heirs at law." By the use of the words "above sum," she provides that the interest on the five thousand dollars shall go to the support of the clergyman, and that, if it shall fail that he is supported, the same sum shall go to her heirs at law, contemplating throughout the whole clause that this sum is to be kept intact, and the income thereof only used by those who may receive the benefit of it. There would certainly be nothing on which the latter portion of the clause could operate, if the contention on behalf of Mr. Chandler is correct. It must be held, not as a limitation subsequently made, and therefore repugnant to the gift, but as a limitation to the gift as made, and thus qualifying and defining it. All to which

Mr. Chandler is entitled, therefore, is the income of the sum of five thousand dollars. *Rogers v. American Board of Commissioners*, 5 Allen, 69. Of this sum the testatrix has at his decease undertaken to make an absolute and final disposition. No case is therefore presented such as arises where the first taker is made the owner of a fund subject to a contingent limitation over upon the occurrence of a certain event, where the money is usually paid to him, as it is his and as the contingency may never happen, and where, if there is danger that it will be wasted, proper security may be required or a trustee appointed. The general rule is here applicable, that in bequests of money or personal property for life, with a bequest over, the first legatee takes the interest or income only, and, in the absence of any expressed intention, the property is either paid to a trustee or held by the executor as such. *Hooper v. Bradbury*, 133 Mass. 803. The executors are, by the terms of the will, appointed trustees, and as a trust arises in regard to this sum they should hold it as such during the life of Mr. Chandler, properly investing the same and paying him the income thereof.

This is the only inquiry which concerns the immediate and present duty of the executors. The bill further requests instructions as to whether the town of Shirley "takes any interest in said sum if it should comply with the conditions specified, or whether said sum shall be paid to the heirs at law or distributees of the testatrix, or fall into the residue as disposed of in the fourteenth clause of said will, or what other legal disposition is to be made of said sum." Under this request various questions have been argued before us as to the ultimate disposal of the fund of five thousand dollars. It has been contended on behalf of the town, that it may take this fund and administer the trust, and also that it may receive the fund, and, the "condition" being illegal and impossible of execution by it, may take it discharged of the condition; and on behalf of the First Parish in Shirley, that the town of Shirley cannot take the property as trustee, and that as the gift is to a public charity it will not be allowed to fail, but the court will frame a scheme to carry out the charitable intent of the testatrix as nearly as possible, appointing a new trustee for this purpose, and the First Parish offers to accept the gift and comply with the conditions on being allowed to add the

income of the fund to its own funds devoted to the same charity. On behalf of the heirs at law and next of kin of the testatrix, it has been urged that the town cannot take on the condition or for the purpose proposed, and that the parish cannot be enabled to take by interpreting the conditional or limited gift of the testatrix as a general gift to promote Unitarian preaching in the town of Shirley, and that therefore at the death of Mr. Chandler the words used by the testatrix, "failing which it shall revert to my heirs at law," will immediately take effect.

It would be premature to discuss these and similar questions before the life interest of Mr. Chandler expires. It has been often held, that one of the principal requisites for the maintenance of a bill for instructions is the fiduciary possession of a fund of which some disposition is required to be made presently. *Putnam v. Collamore*, 109 Mass. 509. *Muldoon v. Muldoon*, 133 Mass. 111. *Wilbur v. Mazam*, 133 Mass. 541. In *Minot v. Taylor*, 129 Mass. 160, a testator had devised property in trust to pay the income to A. for life, with remainder to his children for life, and on their death to pay the principal to A.'s grandchildren on their respectively coming of age. At the death of the testator, A. had one child living, who was then unmarried. At the death of A., this child had children living. It was held that the trustee could not ask the instruction of the court on the question whether the devise to the grandchildren was void for remoteness, until the death of A. A trustee has a right to ask the instruction of the court as to his present duties, but not as to what may be his duty in future contingencies. Whether the powers and duties of towns, or of the town of Shirley, will be controlled when the life interest terminates by the same legislation which now prevails, or whether at that time the First Parish in Shirley will occupy the same relation to religious instruction which it now holds, we cannot say. It is highly probable, certainly, that persons other than those represented before us as the heirs at law and next of kin will then be entitled to be heard. For the immediate duty of the trustees, the instruction already given is sufficient.

The fourteenth paragraph of the will is as follows: "Fourteenthly, after the above willed division of my estate, should there be still property remaining, (to which would be added the

legacy or legacies of any person or persons named in article twelfthly not living at the time of my decease,) I wish it to constitute a fund, to be well invested, the income from which I desire my sisters to apply to the relief and comfort of the poor and unfortunate whom we have aided in past years, and also to others as their judgment may dictate. It is strictly for private charities, and may be known to them, as I consider it, as 'the James and George fund.' It is the best monument I can erect for them. If, on the contrary, my property should have shrunk so far as to make it impossible to carry out all the above named plans, I wish my sisters, nephews, and nieces to be paid in full, and the remainder to be divided *pro rata*."

Upon this paragraph, the question on which all subordinate inquiries depend is whether this gift of income to the three sisters is a gift to them of property to be distributed by them for charitable purposes in the legal sense of the term. The question is primarily one of construction, and the important phrase is one as to the meaning of which we cannot be much aided by precedents, on account of the varieties of phraseology. If it was simply the gift of a sum of money, the residue of her estate, the income of which was to be distributed by her sisters solely to the poor and unfortunate, there would be no doubt that it came within the class of public charities, and, if they were unwilling to execute the trust, it might be executed by others. *Minot v. Baker*, 147 Mass. 348. It is the contention of the heirs, that this clause provides for the distribution to a class not the proper objects of charity, as well as those who are so, and that thus the whole gift is rendered void. *Nichols v. Allen*, 130 Mass. 211, 218. The testatrix provides for a fund to be well invested, the income of which she desires her sisters "to apply to the relief and comfort of the poor and unfortunate." If the sentence had stopped there, it would not have been contended that any but a charitable use could have been made of the fund. They are followed by the words, "whom we have aided in past years, and also to others as their judgment may dictate." It is said that the word "others" means, not merely others than those we have aided in past years, but "others" than "the poor and unfortunate." This is not so natural a construction as that which treats the first clause describing the

beneficiaries together as "the poor and unfortunate," and then dividing them into two classes, those we have aided in past years, and those other than they who are also poor and unfortunate. The word "others," in a clause like this, refers to the last antecedent, unless there is something in the subject matter which requires a different construction. *Cushing v. Worrick*, 9 Gray, 382. Its meaning, as thus referred, is "others" than those "whom we have aided," and not "others" than "the poor and unfortunate." It is thus, with its immediate antecedent, "those whom we have aided," brought within the description of the general class, "the poor and unfortunate," to whom the sisters are authorized to distribute the income of the fund which the testatrix has created. Nor do the words "as their judgment may dictate" empower the sisters to give to any outside this class, but only to make their selection within it.

That a gift should be charitable, there must be some benefit to be conferred upon, or duty to be performed towards, the public at large, or some part thereof, or an indefinite class of persons. A bequest for the aid or benefit of defined persons is not a charity, but a trust only, as a gift to be distributed among certain poor families named, or certain persons identified in the bequest. *Thomas v. Howell*, L. R. 18 Eq. 198, 209. *Liley v. Hey*, 1 Hare, 580. But a gift of a nature such as that of the testatrix does not cease to be a charity because certain persons are named as of the class to be assisted, or even because provision is made that a preference shall be accorded them in the distribution of her bounty. When they are thus provided for as a part of the poor who are to receive the benefit of the donation, its public object and purpose continue, and it is still invested with the character of a public charity.

While there is no bequest of the principal to the sisters in terms, or any words of succession which indicate who is to administer the fund after them, the testatrix provides clearly for the formation of a fund which the whole context of the sentence shows is intended to be permanent in its character. It is to be well invested, and the income is to be applied by them. She speaks of it as the best monument she can erect for her deceased children, and bestows on it their Christian names jointly. There is no bequest of this fund to the sisters, who had been carefully

provided for in other parts of the will, and the payment of whose legacies is guarded by the last clause of the fourteenth paragraph. The trustees appointed by the will are expected to hold it, although there is no express donation to them. To the sisters is given the right first to distribute the income, and through them in the first instance the charitable purpose is to be executed. Although the testatrix does not expressly provide for the appointment of others by whom the income shall be distributed when they shall decease, or if they shall refuse or neglect the duty she has imposed upon them, it cannot be that she expected it would fail. The application of the income of this fund to charity was her dominant object. Having created it, placed it in custody of trustees, confided the distribution of the income to her sisters, devoted to it the residuum of her estate, and left it as a monument to her children, she might well suppose, if her attention was called to the matter, that proper means of executing her purpose could be provided through the medium of the courts, if in any matter of detail her provision therefor was insufficient. The charity intended by the testatrix was clearly specified. If the general object of the bequest is pointed out, or if the testator has fixed the means of doing so by the appointment of trustees with the power of selection vested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect. *White v. Ditson*, 140 Mass. 351, 357.

The use of the words, "It is strictly for private charities," in describing the fund, is relied on as furnishing an argument that the donation of the testatrix is itself a private charity. A gift is charitable where a fund is to be permanently maintained and its income devoted to the relief of the poor and unfortunate, although its distribution is private and to private persons. What the testatrix contemplated was that the mode of administering the charity would be private, and that individuals would receive the benefit of it at the hands of those who administered it, rather than by any distribution of it in a more public manner. The mode in which, as it appears from the evidence, she had in her lifetime distributed the sums given by herself in charity, was to individuals. She always gave directly herself, held this to be the best way, and would never give to public societies. Those

whom she had aided, to whom the allusion is made in the will, are found to have been persons formerly connected with her family, and one person whom she never personally knew, but whose condition or misfortunes had for some reason especially interested her. Her intention is manifested to devote the income of this fund to the general relief of the poor by almsgiving to the needy, individually, through the agency of those who administer it. Each individual immediately receiving assistance may be private, and the charity may be distributed in private, and by a private hand. Such a charity is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected. *Saltonstall v. Sanders*, 11 Allen, 446. In the general and indefinite character of those who may become beneficiaries of the fund created by the testatrix, this gift is readily distinguishable from that considered in *Kent v. Dunham*, 142 Mass. 216, where it was sought to establish as a public charity a gift intended solely for the benefit of the children of the testator and their descendants. In *Saltonstall v. Sanders*, *ubi supra*, where the gift was "in aid of objects and purposes of benevolence or charity, public or private," it was held that the words "public or private" must be taken in their natural meaning, and according to the construction given to them in a great majority of similar cases, to indicate the mode of distribution only. The argument for the heirs at law and next of kin, on this point, relies much on the case of *Ommanney v. Butcher*, Turn. & Russ. 260, where a testator, after making numerous legacies, added, "In case there is any money remaining, I should wish it to be given in private charity," and it was held that this last bequest was too indefinite to be carried out. This case was carefully examined, compared with previous and subsequent decisions of the English courts, and its authority denied after a full discussion, which it is needless here to repeat, in *Saltonstall v. Sanders*, *ubi supra*. There can be no difficulty by the ordinary procedure and methods of a court of chancery in supervising the execution of such a charity, in compelling, when deemed necessary, the rendering of proper accounts, and in providing that those who administer the income of the fund shall devote it in private charity for the relief of the poor and unfortunate.

The result, therefore, is, that the fund created by the fourteenth clause of the will is to be held by the trustees named, and that the income thereof is to be paid to the sisters, to be applied to the relief and comfort of the poor and unfortunate, including those aided theretofore by themselves and the testatrix, in private charities, and as their judgment shall dictate, and that the income will be received by them upon this trust.

Instructions accordingly.

HENRY F. COE vs. WASHINGTON MILLS & others.

Suffolk. April 1, 2, 1889. — June 26, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Public Charity — Resulting Trust — Voluntary Association.

A relief society was formed by the employees in the mills of a manufacturing corporation to aid sick or injured members, its regulations providing that every such employee must be a member; that membership was to cease on leaving the employment of the corporation; that a board of government should be chosen from the superintendents and overseers in the mills; that the corporation and the employees were to contribute each a certain sum weekly to the funds of the society; that the employees were to make their contributions every pay-day, when they received their wages, to the paymaster, who was to hand them over to the treasurer of the society; that sick members should receive a weekly allowance for a certain time; and that a member was not to receive aid until he had been so employed and had regularly contributed for a term of weeks. *Held*, that the society was not a public charitable institution, but that its funds were held by its board of government, in whom was the legal title, upon a private trust for the benefit of its members.

The society existed for many years, until it came to an end upon the dissolution of the corporation, before which time, however, the board of management voted to hand over the funds of the society then remaining to a charitable organization. All the contributors except the corporation assented to the carrying out of its vote. *Held*, that after the society ceased to exist the board held the fund on a resulting trust for the contributors, and that, after paying the corporation its share, the board should pay over the remainder to such charitable organization.

BILL IN EQUITY, filed April 18, 1888, in the nature of an interpleader for instructions as to the disposition of a fund in the hands of the plaintiff. The case was heard by *Devens, J.*, who reported it for the consideration of the full court, and was as follows.

The plaintiff is the treasurer of the Washington Mills, a corporation located at Lawrence. The defendants who appear are the Washington Mills, the Ladies' Union Charitable Society, a corporation also located at Lawrence, and the treasurer and managers of the Washington Mills Relief Society. An order of notice to all other persons who had been members of the relief society was issued and duly served by publication, and, no one appearing, the bill was taken as confessed as against such members.

The Washington Mills was incorporated in 1859, for the manufacture of cotton and woollen goods. In 1868 its employees formed an association called the Washington Mills Relief Society, and adopted "regulations," which, so far as material, were as follows :

"1. The Washington Mills Relief Society is formed for the purpose of extending aid to the sick and to those who may meet with accident while employed here. The Washington Mills corporation shall pay three dollars weekly to its funds.

"2. Every individual employed by the Washington Mills corporation at Lawrence must be a member of this society. Membership will cease on leaving the employment of the Washington Mills.

"3. The officers of the society shall be a president, treasurer, and secretary, with twelve managers, chosen annually the first week in April by and from the superintendents and overseers. These together shall compose a board of government; decide points of dispute, and manage the internal affairs of the society. Five members of the board of managers at a regularly called meeting shall constitute a quorum for the transaction of business. . . .

"5. All disbursements ordered by the board of government shall be made by the treasurer, who shall not retain in his possession more than twenty-five dollars at the close of any week, but shall deposit the surplus with the treasurer of the corporation, who agrees to return the sum deposited whenever called for by the treasurer of the society, in whose name the funds shall stand. . . .

"8. The regular contributions of the members shall be made every pay-day, at the time of receiving their wages, to the pay-

master, who shall forthwith hand over the same to the treasurer of the society.

"9. Every member shall pay four weeks' contributions on entering, and three cents a week thereafter. If a member is discharged from the Washington Mills for dishonesty, drunkenness, insolence, or any crime, he shall not receive any contribution whatever.

"10. The weekly allowance to sick members shall be two dollars. . . .

"11. No member shall be entitled to aid who shall not have regularly contributed for at least eight weeks, and been employed by the Washington Mills for the same length of time. But the board shall have power to grant a donation to persons who may be disabled by accident while at work, if employed for a less time than eight weeks, if in their judgment the state of the funds will warrant it.

"12. The allowance to sick members may continue ten weeks; it shall then be reduced one fourth, and may be extended twenty weeks longer, should sickness continue. At the end of thirty weeks the allowance shall cease entirely; provided that no member shall receive more than fifty dollars in any one year, except by a vote of the board of government. . . .

"15. The overseers shall be stewards of their respective rooms, and have power to appoint assistant stewards as they may deem necessary and proper, whose duty it shall be to visit, once each week, the sick whose residence does not exceed two miles' distance from the mills, to make particular inquiries as to the state of illness, and to see that the invalid is well cared for. Any steward who neglects to visit a sick member within two days after receiving notice of sickness shall be fined twenty-five cents for every instance of neglect. . . .

"18. Any member shall have the right of appeal to the directors of the corporation, or their representatives in Lawrence, whose decision shall be final, in case of dissatisfaction with any acts of the board of government.

"19. These regulations shall be altered or amended only by a vote of two thirds of the board of government, at a meeting specially called for that purpose."

From 1868 to 1885 two thousand persons on the average were

in the employ of the mills, changing daily, all of whom became members of the relief society and contributed to its funds. Early in 1885 the Washington Mills proceeded to wind up its affairs, and discharged its employees, at which time the plaintiff had in his hands \$10,194.28, as the residue of funds which had been deposited with him by successive treasurers of the relief society, and which he desired to pay over to those entitled thereto. At the last meeting of the board of government of the relief society, held on June 25, 1884, and duly called, the following vote was passed: "Voted, on motion of Mr. Ezra Cox, that, in case of a dissolution of the corporation, the fund of the relief society be put into the hands of the Ladies' Union Charitable Society, in trust, the principal to be invested, and the interest therefrom to be applied to the support of free beds in their hospital, for the benefit of the operatives of the Washington Mills, or their successors, preference being given to the former operatives; in case none apply, then the free beds may be used for the benefit of others deserving them." The Ladies' Union Charitable Society maintains a hospital in Lawrence for the relief of the people of that city and others. No meetings of the board of managers or of the relief society have been held since that date, and the plaintiff still holds the funds of the society.

The Washington Mills contended that it was entitled to have the fund paid directly to it; the treasurer of the relief society contended that the fund should be paid to him as such; the Ladies' Union Charitable Society contended, with the assent of the defendant managers of the relief society, that the fund should be paid over to it.

R. F. Sturgis, for the plaintiff, read the papers in the case.

E. T. Burley & C. U. Bell, for the Ladies' Union Charitable Society.

C. K. Cobb, for the Washington Mills.

MORTON, C. J. The Washington Mills Relief Society was a voluntary association, formed, as its "regulations" state, "for the purpose of extending aid to the sick and to those who may meet with accident while employed here." By its "regulations," which were the only articles of association, "Every individual employed by the Washington Mills corporation at Lawrence must be a member of this society. Membership

will cease on leaving the employment of the Washington Mills." The corporation was to pay "three dollars weekly to its funds," and each member was to pay "four weeks' contributions on entering, and three cents a week thereafter," the contributions of the members to be "made every pay-day, at the time of receiving their wages, to the paymaster, who shall forthwith hand over the same to the treasurer of the society." The regulations further provided, that "the weekly allowance to sick members shall be two dollars"; that the allowance may be continued ten weeks; and that it shall then be reduced one fourth, and may be extended twenty weeks longer, "provided that no member shall receive more than fifty dollars in any one year, except by a vote of the board of government." No member was entitled to aid "who shall not have regularly contributed for at least eight weeks, and been employed by the Washington Mills for the same length of time."

We have stated enough of the regulations to show the purpose and scope of the association. It was a voluntary association for the mutual benefit of its members, and cannot be held to be a public charitable institution. To constitute a public charity, there must be an absolute gift to a charitable use for the benefit of the public. In this case the contributions of the members were not gifts for a charitable use for the benefit of the public, but they were payments for their own advantage, and were in the nature of premiums for insurance against sickness and accidents. Each member paid a regular fee or assessment, and in consideration thereof he became entitled to a certain benefit in case of sickness or accident, as a personal right. He could enforce this before the tribunal provided in the regulations, viz. the directors of the Washington Mills, and if no such tribunal had been provided, he could enforce it in a court of law. *Dolan v. Court Good Samaritan*, 128 Mass. 437. *Bauer v. Samson Lodge*, 102 Ind. 262.

No private person can maintain an action to enforce the exercise of a public charity in his favor. As is stated in *Attorney General v. Federal Street Meeting-house*, 3 Gray, 1, 50, "A public charity, in legal contemplation, is derived from gift or bounty; . . . but where a fund is derived from rates and assessments, being in no respect derived from bounty or charity, it is

not charitable. So a subscription by a benefit society, for mutual relief, is to a private, and not a public charity, and does not require the intervention of the Attorney General." See *Old South Society v. Crocker*, 119 Mass. 1, 24. *Saltonstall v. Sanders*, 11 Allen, 446, 464.

The contributions of the members were not in their nature, and were not intended to be, gifts for a general public use, but were for the advantage of the members only. *Swift v. Easton Beneficial Society*, 73 Penn. St. 362. *Bangor v. Rising Virtue Lodge*, 73 Maine, 428. *Donohugh's appeal*, 86 Penn. St. 306.

It is true that the contributions by the corporation were of a different character, but they did not change the general scheme or purpose, and they were, we think, gifts to a private use, and not to a public charity.

We are, for these reasons, of the opinion that this is not a case of a public charity, in which, under the doctrine of *cy pres*, we can by a decree devote the funds which have accumulated to a public charitable use.

The society was in operation for about seventeen years, and a fund amounting to about ten thousand dollars had accumulated, when it came to an end by the dissolution of the Washington Mills corporation. The next question is, In whom is the title to this fund?

It was a voluntary association of peculiar character. The corporation was not a member, but practically it had, by virtue of its right to change its employees, the power to change the membership of the society and of the board of management. The members generally had no vote or voice in the management of its affairs, which were controlled by a "board of government," chosen annually "by and from the superintendents and overseers." In effect, the assessments of the members and the contributions of the corporation were placed in the hands of this "board of government," for certain purposes prescribed in the regulations. They had no right to apply them to any other purpose. The legal title to the fund was in them, but they held it upon the trusts prescribed. When the corporation was dissolved, the society ceased to exist and the trusts failed. The regulations made no provision for such a contingency, and we think that the board, after the failure of the trusts, held the

fund, not for its own benefit, but for the contributors and donors as a resulting trust. *Easterbrooks v. Tillinghast*, 5 Gray, 17. *Sears v. Hardy*, 120 Mass. 524. 2 Story Eq. Jur. § 1200.

If the corporation had contributed the whole of the funds, not as a public charity, but for the support of this particular society during its life, it would seem to be very clear that at the death of the society the accumulated fund ought to go to it by way of a resulting trust. No one else could present any claim to it. The principle is not changed because the contributors are in fact very numerous. We are therefore of opinion, that at the extinction of this society the board of government held the fund in question for the benefit of all the contributors, and that they are entitled to it, each in proportion to the amount contributed by him. The amount contributed by the corporation is not precisely fixed, but it appears to be about five per cent of the whole amount. It is entitled to this proportion, and, if the parties desire it, the case may be referred to a master to determine the exact amount. We are not able to see any ground upon which its claim to the whole of the fund can be sustained.

In dealing with the question of the disposition of the residue, it is necessary to refer to some further facts which exist in the case. At a meeting of the board of government of the relief society held on June 25, 1884, it was "Voted, on motion of Mr. Ezra Cox, that, in case of a dissolution of the corporation, the fund of the relief society be put into the hands of the Ladies' Union Charitable Society, in trust, the principal to be invested, and the interest therefrom to be applied to the support of free beds in their hospital, for the benefit of the operatives of the Washington Mills, or their successors, preference being given to the former operatives; in case none apply, then the free beds may be used for the benefit of others deserving them." The board of government now desire to carry out this vote. Personal service in this suit was made upon several of the former members of the relief society, who appear and announce that they each and all disclaim any joint or several right, title, or interest in said fund adverse to the rights of said Ladies' Union Charitable Society, acquired by the vote set forth in said bill, and request that said fund be decreed to said charitable

society under the terms of the vote aforesaid. Notice by publication was served upon all who have been members of the relief society; no one appears, and as to them the bill has been taken *pro confesso*. The defendants, who have been defaulted, must be deemed to have abandoned their claims to the fund, or to have assented to the disposition of it according to the above vote. As to the residue, after paying the corporation its proportion, the board of government hold the legal title, and have the assent of all parties equitably interested that it may be paid according to its vote. We see no reason why it may not do so, and discharge itself of all responsibility.

We cannot agree with the argument that the board of government had the power under the regulations to dispose of the whole of this fund. The powers given them "to decide points of dispute, and manage the internal affairs of the society," were intended to apply to the ordinary business of the society and the management of its prudential affairs, and do not extend to the disposal of the funds in any other way than those prescribed by the regulations.

Decree accordingly.

GEORGE H. CARLETON & others vs. MARY F. RUGG
& others.

Essex. November 10, 1888. — September 3, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES,
& KNOWLTON, JJ.

*Intoxicating Liquors — Common Nuisance — Equity Jurisdiction to enjoin —
Constitutional Law — Evidence — Name — Preliminary Injunction.*

The St. of 1887, c. 380, § 1, conferring jurisdiction in equity to restrain or abate by injunction as a common nuisance any building, place, or tenement resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, upon an information by a district attorney or upon the petition of not less than ten legal voters of the town or city where it is situated, is constitutional. FIELD, DEVENS, & W. ALLEN, JJ., dissenting.

A petition on that statute, purporting to be signed by ten legal voters of a city, bore among others the signature "A. M. Allen," and at the hearing thereon evidence was admitted that Augustine M. Allen, a legal voter of that city, signed the petition by that name. *Held*, that the petition was sufficiently signed, and that the evidence was properly admitted.

On such a petition the respondent, for the purposes of the hearing, admitted the allegations of the petition which followed the statute to be true, and the judge who heard the case granted a preliminary injunction. *Held*, that the issue of such an injunction was within the discretion of the judge.

PETITION, under the St. of 1887, c. 380, to the Superior Court, filed September 6, 1888, purporting to be signed by ten "legal voters in the city of Haverhill," and alleging "that a certain tenement in a building at the corner of Locust and Essex Streets in said Haverhill, which tenement is bounded as follows, southerly by Essex Street, easterly and northerly by land of Mary F. Rugg and others, and westerly by Locust Street, is used for the illegal keeping and sale of intoxicating liquors to the common nuisance of all good citizens; that the occupant of said tenement is John E. King; that the owners of said building are Mary F. Rugg, Mary E. Rugg, Ella A. Chesley, and Willie E. Rugg, all of Haverhill, in the county of Essex. Wherefore your petitioners pray that your Honors will restrain, enjoin, and abate said tenement as a common nuisance, and restrain and enjoin said owners, and occupant, their servants and agents, from continuing or permitting the continuance of said illegal keeping and sale of intoxicating liquors in said building."

At the hearing before *Lathrop, J.*, the respondents contended that the petition was not properly signed, or signed by ten legal voters of Haverhill, as required by the statute, but, for the purposes of the hearing, admitted that the other allegations of the petition were true. The petition was signed by nine legal voters of the city of Haverhill, the tenth signature being as follows: "A. M. Allen." The petitioners admitted that the name "A. M. Allen" did not appear upon the official list of qualified voters, or upon the register of voters kept by the registrars of the city of Haverhill, but they offered to prove that Augustine M. Allen, a legal voter of Haverhill, was the person who signed the petition by the name "A. M. Allen." The respondents objected to the admission of this evidence, and requested the judge to rule that the same was incompetent, and that evidence other than the official list of qualified voters, or the register of voters kept by the registrars of Haverhill, could not be offered to show that "A. M. Allen" was a legal voter

of Haverhill. But the judge ruled that the evidence was admissible, and thereupon the respondents, for the purposes of the hearing, admitted that Augustine M. Allen was a legal voter of Haverhill, and that he was the person who signed the petition by the signature "A. M. Allen."

There was no evidence or claim on the part of the petitioners that the petitioners or any one of them would suffer any damage or injury by the continuance of the alleged nuisance beyond that common to all law-abiding citizens. Whereupon the respondents objected that this cause did not come within the class of equity cases which, in the exercise of a sound discretion, call for a preliminary injunction, and requested the judge to refuse such an injunction. An interlocutory decree ordering a preliminary injunction was, however, made.

The respondents requested a ruling that the St. of 1887, c. 380, was unconstitutional, but the judge ruled that the statute was constitutional, and, being of the opinion that the interlocutory decree so affected the merits of the controversy that the matter ought to be determined by this court before further proceedings were had, ordered a stay of all further proceedings, and reported for the determination of this court the following questions:

"First. Whether chapter 380 of the acts of 1887 is constitutional?

"Second. Whether, upon the facts stated in this report, the petition was signed as required by that chapter?

"Third. Whether, upon the facts stated in this report, it was within the power of the justice of this court, in the exercise of his discretion, to order a preliminary injunction?"

W. H. Moody, for the petitioners.

E. B. Fuller, for the respondents.

KNOWLTON, J. The St. of 1887, c. 380, § 1, is as follows: "The Supreme Judicial Court and Superior Court shall have jurisdiction in equity upon information filed by the district attorney for the district, or upon the petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or is used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and an injunction

for such purpose may be issued by any justice of either of said courts."

The first question reported for our decision is, whether this statute is constitutional. The respondents contend that it is in conflict with Article XII. of the Declaration of Rights, which provides that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, . . . but by the judgment of his peers, or the law of the land." The right of the Legislature, in the exercise of the police power of the Commonwealth, to pass laws regulating the sale of intoxicating liquors, or absolutely prohibiting it except for medicinal, mechanical, or chemical purposes, has been repeatedly asserted in able and elaborate opinions of this court and of the Supreme Court of the United States, which cover every question that can fairly be raised under the Constitution of Massachusetts or under that of the United States. *Fisher v. McGirr*, 1 Gray, 1. *License Cases*, 5 How. 504. *Bartemeyer v. Iowa*, 18 Wall. 129. *Beer Co. v. Massachusetts*, 97 U. S. 25. *Mugler v. Kansas*, 123 U. S. 623. *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153.

We do not understand the respondents to contend that the provisions of the Pub. Sts. c. 100, which regulate the sale of intoxicating liquors, or those of the Pub. Sts. c. 101, § 6, which declare that "all buildings, places, or tenements . . . used for the illegal keeping or sale of intoxicating liquor shall be deemed common nuisances," are unconstitutional. But the argument is, that, by a process in equity for the abatement of an alleged common nuisance of the kind named in this statute, they are liable to be deprived of their property, immunities, and privileges otherwise than by the judgment of their peers or the law of the land.

The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through

property in which they may be interested. That which is declared by a valid statute to be a nuisance, is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance. *Attorney General v. Hunter*, 1 Dev. Eq. 12. *People v. St. Louis*, 5 Gilman, 351. *Ewell v. Greenwood*, 26 Iowa, 377. *Minke v. Hopeman*, 87 Ill. 450.

Apart from the method provided for instituting proceedings, the statute under consideration merely says that courts of equity shall have jurisdiction of this kind of public nuisances, as they have of others. It authorizes the making of any reasonable order, or the issue of any proper process, adapted to the abatement or prevention of the nuisance. There can be no doubt of the constitutional right of the Legislature to prescribe the agency to represent the public in setting the law in motion. That may as well be the district attorney of the district, or ten legal voters of the town where the nuisance is alleged to exist, as the Attorney General, if the Legislature so determines. *Littleton v. Fritz*, 65 Iowa, 488. *Kansas v. Ziebold*, 123 U. S. 623.

It is urged that this statute makes no provision for a trial by jury. This objection applies as well to nearly all our legislation giving jurisdiction in equity. The Pub. Sts. c. 151, § 27, provides for a trial by jury in every case in equity in which that mode of trial is deemed by the court to be desirable. In cases in equity in which defendants have a constitutional right to such a trial, the courts secure it to them. *Powers v. Raymond*, 137 Mass. 483.

In the very recent case of *Kansas v. Ziebold*, *ubi supra*, the Supreme Court of the United States fully considered all the constitutional questions which arise in the case at bar. In the law of Kansas in relation to nuisances of the kind we are considering is this language: "The attorney general, county attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action,

and no bond shall be required." Comp. Laws Kans. 1885, c. 85, § 18. Then follow provisions for punishing disobedience of an injunction as for a contempt. The defendants were the owners of a brewery which was built before the passage of the statute, and was worth about \$10,000 if it could be used for brewing beer, but was of little value for any other use. Under the law, a building so used was a nuisance. A suit in equity was brought under the statute, alleging that the defendant's building was used for manufacturing intoxicating liquor, and praying that it might be abated as a nuisance. The defendants contended that the statute, if enforced, would abridge their privileges and immunities, and deprive them of their property without due process of law, and was in violation of the Fourteenth Amendment of the Constitution of the United States. But, in a very elaborate opinion, the court held otherwise, and sustained the constitutionality of the law in every particular. The statute made no provision for a trial by jury, and it seems that under the Constitution of Kansas parties are entitled to a trial in that mode in all cases in which that had been the method of trial prior to the adoption of the Constitution. The court held that a proceeding in equity to abate a nuisance without such a trial was "due process of law," because it had not been the custom to try such cases to a jury. Similar decisions have been made in Iowa and in Kansas. *Litleton v. Fritz*, 65 Iowa, 488. *State v. Crawford*, 28 Kans. 726.

In our State, the right to proceed in equity to abate public nuisances, and to destroy private property in the exercise of the police power, when necessary for the protection of the public, has been recognized in many cases. *District Attorney v. Lynn & Boston Railroad*, 16 Gray, 242. *Belcher v. Farrar*, 8 Allen, 325. *Winthrop v. Farrar*, 11 Allen, 398. *Attorney General v. Tudor Ice Co.* 104 Mass. 239. *Watertown v. Mayo*, 109 Mass. 315. *Bancroft v. Cambridge*, 126 Mass. 438. We are of opinion that the statute is constitutional.

It was competent for the petitioners to show that the person who signed the petition by the name "A. M. Allen" was Augustine M. Allen, who was a legal voter in the city of Haverhill. *Commonwealth v. Hamilton*, 15 Gray, 480.

The third question relates to the power of the justice, in the

exercise of his discretion, to order a preliminary injunction. The principles by which the court should be governed, in dealing with an application for a preliminary injunction under this statute, are the same as apply to proceedings to enjoin other kinds of public nuisances. The ten legal voters who unite in a petition represent the public, as does the Attorney General in other similar cases. The fact that no one of them in the present case would suffer any damage by the continuance of the nuisance beyond that common to all law-abiding citizens, was immaterial.

In all suits in equity, before a case can be regularly heard upon its merits, the defendant must have the reasonable time prescribed by the rule in which to answer; issues whether of law or of fact must be made up, and an opportunity given to prepare for the hearing. An application for a preliminary injunction rests upon the alleged existence of an emergency, or of a special reason for an order before the case can be regularly heard. It is only to prevent serious injury, for which there is no other complete and adequate remedy, that a court is justified in interfering with the conduct of persons or the use of property before trial. Properly to determine what shall be done in cases of this kind involves an exercise of sound discretion by the presiding judge, who should look to the interests of the petitioners, and of the public whom they represent, and should at the same time remember that without good reason a respondent is not to be dealt with *ex parte*, nor forced to trial before the case is ripe for hearing. It should be borne in mind, that this is not a statute which professes to look to the conduct of persons to prevent the commission of crime. If it were, it would have no legitimate place in our jurisprudence. There is no doubt that in hearings upon applications for preliminary injunctions and orders *pendente lite* in suits in equity, and in proceedings for the punishment of contempt of court, the parties have no constitutional right to a trial by jury. It would be an anomalous proceeding for a court to enjoin a defendant from committing the crime of larceny, or of selling intoxicating liquors, with a view to punish as disobedience of the injunction and contempt of court the same act which was before punishable as a crime. If that could be done, an accused person through a mere change of form in the proceedings might

be punished for a crime without a trial by jury, and in violation of both the Federal and State Constitutions. There would be strong ground for contending that a statute which should attempt to authorize such a method of preventing or punishing ordinary crimes would be unconstitutional. Indeed, even where a plaintiff seeks the aid of a court of equity to protect him from irreparable injury through the threatened publication of a libel, or the commission of some other like crime, the courts decline to interfere. *Brandreth v. Lance*, 8 Paige, 24. *Fleming v. Newton*, 1 H. L. Cas. 363, 376. *Boston Diatite Co. v. Florence Manuf. Co.* 114 Mass. 69.

In proceeding under this statute,—not for the purpose of forbidding by order a personal act which the law forbids under the penalty of fine and imprisonment, but for the purpose of protecting the community from a harmful use of property,—courts in determining whether to issue a preliminary injunction should look to the nature of the building or tenement, and the use to which it is being put, and is likely to be put, to see whether the continuance of it will be seriously detrimental to the community, before the rights of the parties can be finally determined. We can imagine a case in which a tenement might be alleged to be a nuisance by reason of its use for the unlawful sale of intoxicating liquors for medicinal purposes. Under the rules of practice in equity, it can hardly be contended that the court would be called upon to issue an injunction in such a case, until the existence of the nuisance had been established at the final hearing. On the other hand, we can imagine a case in which a tenement, used for the illegal sale of intoxicating liquors, might be so situated and so kept that every day's continuance of it would inflict serious injury upon the people in its vicinity. In such a suit a court might well take measures to abate the nuisance upon a preliminary hearing.

In the case at bar, the respondents, for the purposes of the hearing, admitted that the allegations of the petition were true. By this admission, the principal reason for not granting an injunction before the final hearing was eliminated from the case. Usually there is a question of fact in dispute, of a kind which, at the request of either party, is commonly submitted to a jury. Indeed, it can be argued with much force, but whether effect-

ally it is unnecessary now to decide, that upon this question as to the use made of the property the parties at the hearing upon the merits have a constitutional right to a trial by jury. See *Merchants' National Bank v. Moulton*, 148 Mass. 548. The respondents having conceded facts which, if proved at the final hearing, will require a decree in favor of the petitioners, it was within the power of the presiding judge, in the exercise of his discretion, to order a preliminary injunction.

Injunction to issue.

FIELD, J. In considering the constitutionality of the St. of 1887, c. 380, it is first necessary to determine its meaning, because a statute must be carried into effect, if at all, according to the intention of the Legislature, as expressed in it. *Fisher v. McGirr*, 1 Gray, 1, 22.

The present case raises the question of the constitutionality of the St. of 1887, c. 380, only so far as it relates to the use of a building, place, or tenement for the illegal keeping or illegal sale of intoxicating liquors. The statute plainly provides for a public prosecution, to be instituted either by a district attorney or by ten or more legal voters, for the purpose of preventing a violation of the statutes regulating the sale of intoxicating liquors. The statute was not enacted for the protection of private rights. In proceedings under it, it is immaterial whether the use makes the building, place, or tenement dangerous or offensive to the neighbors or to the inhabitants generally. The keeping or sale of intoxicating liquors may be so secret as to be unknown to them, or they may desire that intoxicating liquors be kept or sold there; yet these facts would not be a defence, because the statute is enacted for the purpose of enforcing the public policy of the Commonwealth in regard to the keeping and sale of intoxicating liquors. The sale, or keeping for sale, of intoxicating liquors, in violation of law, may be detrimental to a community, but the place where they are sold or kept is not thereby commonly rendered physically dangerous to the health or safety, or offensive to the senses, of the persons who dwell near it, and the statute applies to any keeping of intoxicating liquors in any particular building, place, or tenement, with the intention of illegally selling them anywhere within the Commonwealth. *Commonwealth v. Gillon*, 148 Mass. 15.

The jurisdiction given by the statute is jurisdiction in equity; the only fact required to be alleged in the information is that the building, place, or tenement described "is used for the illegal keeping or sale of intoxicating liquors"; the only remedy given is "to restrain, enjoin, or abate the same as a common nuisance," and the only process provided is that "an injunction for such purpose may be issued by any justice of either" the Supreme Judicial Court or the Superior Court. There is no provision for the destruction or the forfeiture of the building, place, or tenement, or of any other property, or for shutting up the building or tenement, or for excluding any person from the possession; and it can hardly be contended that any process under this statute could be issued for destroying a building or tenement, or for changing the title or physical condition of a building, place, or tenement. Buildings, places, and tenements used for the purposes described in this statute have for many years been declared to be common nuisances by other provisions of statute, and it has never been considered that they could be destroyed, or that their physical condition could be changed, except in cases falling within the express authority given by § 10 of chapter 101 of the Public Statutes. Pub. Sts. c. 101, §§ 6-9.

The injunction issued in this case, and probably the only one that could have been issued, is one enjoining the respondents from using, or permitting to be used, the building, place, or tenement for the illegal keeping or sale of intoxicating liquors. The Public Statutes prohibit such a use as a crime, and the only effect of the injunction is to subject the respondents to the process used for punishing persons guilty of violating injunctions, in addition to or in substitution for criminal process. The Legislature apparently thought that a remedy in equity would be more speedy, or more certain, or more efficient, than that by complaint or indictment. The issuing of the injunction of itself adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process employed by courts of equity in punishing persons guilty of wilful violations of injunctions. The efficacy of the statute, apart from the fact that the prosecution may be beyond the control of the district attorney, depends wholly upon the proceedings that may be

taken for punishing violations of injunctions. There can be no decree for damages, or for a penalty, or directly affecting the title or condition of property. It is not contended that the statute was intended to secure to a respondent a trial by jury in a hearing upon a charge that he had violated an injunction issued by the court, and it is the well known practice of courts of equity to hear and determine such a charge without a jury. If the proceedings under the statute are to follow the analogy of bills in equity brought to enjoin the creation or continuance of a private nuisance, it must have been the intention of the Legislature that it should be within the power of a justice of either of the courts mentioned to issue an interlocutory injunction, and to punish the respondent if he violated it, and it is well known that courts of equity do not try applications for an interlocutory injunction with the aid of a jury.

Indeed, there are many indications that the principal reason why the statute was passed was to avoid a trial by jury, and if the information is not regarded as essentially a criminal prosecution, it is difficult to see how the respondent is entitled as of right to a trial by jury at any stage of the proceedings, unless the suit is considered as involving a controversy concerning property within the meaning of Article XV. of the Declaration of Rights. But as no decree can be entered which directly affects property, it may be doubted whether it can be considered as involving such a controversy, and the proceeding was not intended for the vindication of private rights of property, whether belonging to one or to many persons. The fact that a court may grant a trial by jury upon the issue whether the building, place, or tenement was used by the respondent, at the time the information was filed, for the illegal keeping or sale of intoxicating liquors, does not remove the difficulty; for a finding upon this question is not followed by any decree which directly affects the person of the defendant or the condition of the property. A finding upon this question is a preliminary to the issuing of a perpetual injunction, and the punishment is imposed when the respondent has been found guilty of violating the injunction. Property is often forfeited as a punishment for crime, and suits instituted for that purpose are regarded as criminal or penal. Property is sometimes destroyed or its character changed

because its nature or condition is such as to make it dangerous or offensive to the community, and suits for the destruction of such property, or for changing its character, are not necessarily either criminal or penal. I think there is no doubt that, if the proceedings under this statute are intended to prevent the repeated commission of a criminal act by the punishment, or the threatened punishment, of a person charged with having committed it, the procedure provided by the statute is inconsistent with Article XII. of the Declaration of Rights. *Fisher v. McGirr*, 1 Gray, 1, 22, 26. *Sullivan v. Adams*, 3 Gray, 476. *Jones v. Robbins*, 8 Gray, 329. *Brown v. Perkins*, 12 Gray, 89. *Nolan's case*, 122 Mass. 330. *Commonwealth v. Horregan*, 127 Mass. 450.

The case most relied on by the petitioners is *Kansas v. Ziebold*, reported with the two cases of *Mugler v. Kansas*, in 123 U. S. 623. The question there considered was whether § 13 of chapter 128 of the St. of Kansas of 1881, as amended by the St. of Kansas of 1885, c. 149, § 13, approved on March 7, 1885, (Comp. Laws Kans. 1885, c. 35, § 13,) was in violation of the Fourteenth Amendment of the Constitution of the United States. See *State v. Crawford*, 28 Kans. 726, 743; *Schmidt v. Cobb*, 119 U. S. 286; *Kidd v. Pearson*, 128 U. S. 1. That section, as amended, declared that every place where intoxicating liquors were sold, manufactured, etc., in violation of the act, was a common nuisance, and it authorized the attorney general, county attorney, or any citizen to maintain an action in the name of the State; and it provided that if, by the judgment of any court having jurisdiction, such place was found to be a nuisance, the sheriff, etc. "shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance," and that an injunction might issue at the commencement of the action without giving a bond, and that any person violating the terms of any injunction granted in such a proceeding should be punished as for contempt, by a fine, or imprisonment, or both. The people of Kansas, in November, 1880, had adopted an amendment to their Constitution prohibiting the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes. The question

was not much considered in that case, if it was considered at all, whether that statute was consistent with the Constitution of Kansas; and the decision in effect is that the proceedings authorized by it were not inconsistent with the Fourteenth Amendment of the Constitution of the United States.

In the cases of *Mugler v. Kansas*, *ubi supra*, there were writs of error to the Supreme Court of the State of Kansas, and the Supreme Court of the United States was necessarily confined to the Federal questions involved in the suits. *Kansas v. Ziebold* was an information against Ziebold and his copartner, brought in the State court, and it was removed to the Circuit Court of the United States by the defendants, on what ground does not appear. That court dismissed the information on hearing, and the State of Kansas appealed to the Supreme Court of the United States. In that case it was perhaps competent for the Supreme Court of the United States to decide whether the statute of the State of Kansas was consistent with the Constitution of that State; but in deciding this, it would follow the decision of the Supreme Court of that State, if that court had decided it. It does not appear that the precise question involved in that case had been decided by the Supreme Court of Kansas, but the opinion of the Supreme Court of the United States cannot be considered as a careful determination of the question of the conformity of the statute with the Constitution of that State. See *Baldwin v. Kansas*, 129 U. S. 52; *Spencer v. Merchant*, 125 U. S. 845; *Bucher v. Cheshire Railroad*, 125 U. S. 555, 583; *Barbier v. Connolly*, 113 U. S. 27; *Schmidt v. Cobb*, 119 U. S. 286; *State v. Whisner*, 35 Kans. 271.

The phrase "due process of law," contained in the Fourteenth Amendment of the Constitution of the United States, has not been construed to mean that parties shall be entitled to a jury trial in civil suits at common law, or that a person shall be tried for a felony or a capital crime only on presentment of a grand jury, and it is doubtful, even, if it would be held that the amendment secures a trial by jury in criminal cases. The clause of that amendment we are considering is a restraint on all the States of the United States, and the Supreme Court of the United States has taken notice that there are considerable diversities in the jurisprudence of the different States. That court

says, in *Walker v. Sauvinet*, 92 U. S. 90, 93: "This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. . . . Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." In *Missouri v. Lewis*, 101 U. S. 22, 31, that court says: "Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding." In *Dent v. West Virginia*, 129 U. S. 114, 124, that court says: "It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." Apparently any mode of procedure duly established by a State, which provides for an impartial trial, and does not violate the fundamental principles of general jurisprudence, would be due process of law within the meaning of that amendment. A different construction has been given by this court to the phrase "the law of the land," contained in Article XII. of our Declaration of Rights, and *Kansas v. Ziebold* is not an authority upon the meaning of our Constitution. See *Hurtado v. People*, 110 U. S. 516; *Jones v. Robbins*, and other Massachusetts cases cited *ubi supra*. It will hardly be contended that intoxicating liquors can be destroyed in this Commonwealth because they are kept for sale in violation of law, unless this fact has been found by a jury. *Fisher v. McGirr*, 1 Gray, 1. *Brown v. Perkins*, 12 Gray, 89. See *Ely v. Supervisors*, 36 N. Y. 297; *Gray v. Ayres*, 7 Dana, 375; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Rex v. Pappineau*, Strange, 686.

In *Kansas v. Ziebold*, *ubi supra*, and in *Littleton v. Fritz*, 65 Iowa, 488, a good deal of reliance was placed upon the jurisdiction of courts of equity over informations filed by the Attorney

General to enjoin public nuisances, and it is said that this jurisdiction extends not only to purprestures, but also to public nuisances, strictly so called. In *Littleton v. Fritz*, it was conceded, for the purposes of the decision, that at the time of the adoption of the Constitution of Iowa courts of equity declined to entertain suits to restrain and abate public nuisances in cases where rights of property were not involved. In *Missouri v. Uhrig*, 14 Mo. App. 413, this jurisdiction was examined, and the court says that it had been exercised only in three classes of cases: first, "to restrain purprestures of public highways or navigations"; secondly, "to restrain threatened nuisances dangerous to the health of a whole community"; thirdly, "to restrain *ultra vires* acts of corporations injurious to public right"; and that "the exercise of equity jurisdiction in these three classes of cases is an exception to a very general, well understood, and important rule, . . . that a court of equity has no jurisdiction in matters of crime."

In *Attorney General v. Tudor Ice Co.* 104 Mass. 239, this court says, that sitting in equity it "does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth." The court also says that "the only cases in which informations in equity in the name of the Attorney General have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. . . . The other is of trusts for charitable purposes," etc. See *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361; *Attorney General v. Consumers' Gas Co.* 142 Mass. 417. No case has been cited where, under the general jurisdiction of a court of equity, an injunction has been granted in behalf of the public to restrain a person from selling intoxicating liquors, or from keeping them for sale in violation of statutes, or from doing similar acts which have been prohibited on general considerations of public policy. So far as appears, courts acting under their general equity powers have refused to entertain suits brought for this

purpose. *Missouri v. Ubrig*, 14 Mo. App. 413. *State v. Crawford*, 28 Kans. 726.

The Massachusetts Statute of 1887, c. 380, was not passed for the abatement of a nuisance by destroying or changing the character or condition of tangible property, or by removing obstructions to the exercise of a public right. Its purpose was, I think, to prevent the illegal sale of intoxicating liquors by punishing by fine or imprisonment, or by both, without limit, in the discretion of the court, any person who sells or keeps such liquors for sale after he has been enjoined by the court. The prevention of crime by the punishment of persons found guilty of an offence against a general law is the end aimed at. The keeping or selling of intoxicating liquors without a license was a well known offence when our Constitution was adopted, and the procedure for punishing it, or for forfeiting the liquors, was also well known. Articles XII. and XV. were inserted in the Declaration of Rights as a protection to every individual in his life, liberty, and property. If a statute had given jurisdiction in equity to hear without a jury an information like this, and had authorized the court, on finding the respondent guilty, to punish him in its discretion, without limit, by fine, or imprisonment, or both, in what substantial respect would such a statute differ from this? The Legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things by affixing to them new names. If the Legislature, by statute, can authorize a court in a public prosecution to enjoin any person from illegally keeping or selling intoxicating liquors in any specified place within the Commonwealth, why cannot it authorize a court to enjoin any person from illegally keeping or selling intoxicating liquors anywhere within the Commonwealth? and, if this can be done, why can it not authorize a court at the suit of the Commonwealth to enjoin any person from doing any illegal or criminal act anywhere within the Commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty?

Except for constitutional limitations, the Legislature could deal with all crimes by way of injunctions in equity. Indeed, if this jurisdiction were confined to crimes having some direct

relation to a particular building, place, or tenement, the number of such crimes is large, and all crimes have some relation to place, as they must be committed somewhere. The harboring or concealing of criminals; the receiving or concealing of stolen or embezzled property; the making or keeping of instruments intended for criminal use; the violation of the provisions of criminal statutes regulating trade; burglary, arson, and other similar offences,—have a direct relation to a particular building, place, or tenement, and the building, place, or tenement in which these offences are committed may be said to be used for the purpose. In the prosecution of crimes by way of injunctions in equity, the existing statute of limitations would not be a defence, and the whole course of criminal procedure would be changed. It was not the intention of the Constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting without a jury, and subject to no limitations upon its power to fine and imprison except its own discretion. The safeguards of the common law were carefully secured by the Declaration of Rights, both in public prosecutions and in private suits, “except in cases in which it has heretofore been otherways used and practised.” This is not such a case, and the only thing novel about it is the procedure. Statutes against illegally selling or keeping for sale intoxicating liquors, from the earliest times, have been enforced by criminal complaints or indictments, or by penal actions. Such statutes were never enforced in equity anywhere when the Constitution was adopted. I think that the statute under which the present proceedings were brought is inconsistent with Article XII. of the Declaration of Rights.

Mr. Justice Devens and Mr. Justice William Allen concur in this dissent.

SAMUEL TILDEN *vs.* FREDERICK P. GREENWOOD.

MILLICENT G. TILDEN *vs.* SAME.

SAMUEL TILDEN, administrator, *vs.* SAME.

SAME *vs.* SAME.

MAUD G. TILDEN *vs.* SAME.

JOHN G. TILDEN *vs.* SAME.

FREEMAN F. TILDEN *vs.* SAME.

Suffolk. January 22, 23, 1889. — September 3, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

*Mortgage — Lease by Mortgagor — Fraudulent Representations —
Liability of Mortgagee — Agent.*

A mortgagee of a dwelling-house was held not liable for alleged misrepresentations as to its sanitary condition made by the mortgagor in possession in letting the same, in the absence of any evidence that he was acting as the agent of the mortgagee.

SEVEN ACTIONS OF TORT for false and fraudulent representations made by the defendant, between July 1 and July 6, 1886, whereby the first named plaintiff was induced to hire a dwelling-house infected with diphtheria, to the injury of himself and his wife and children, who, with himself as administrator of deceased children, were the other plaintiffs. The cases were tried together in the Superior Court, before *Hammond, J.*, who ruled upon the evidence that neither action could be maintained, and directed in each case a verdict for the defendant, and reported the cases for the determination of this court. The material facts appear in the opinion.

C. G. Fall, for the plaintiffs.

J. B. Richardson, for the defendant.

C. ALLEN, J. The ruling was a general one, that, on all the evidence, neither action could be maintained. If, therefore, it is found that in any essential particular the case of each of the several plaintiffs fails, judgment must be entered on the verdict for the defendant.

The actions were originally brought against Frederick P. Greenwood, Charles Greenwood, and Adeline Greenwood; but, for some reason not stated, at the close of the evidence, the

plaintiff in each case discontinued as to all the defendants except Frederick P. Greenwood. The alleged misrepresentations upon which the several actions rest were made by Charles Greenwood alone, and the right to recover against Frederick must depend upon the production of evidence sufficient to show that he was bound by misrepresentations of Charles.

The evidence as to the interest of Frederick P. Greenwood in the house, and as to the agency of Charles and his authority to act for Frederick, is stated in full in the report. There was no controversy as to the facts. At the time when the house was let to Tilden, the record title stood in Frederick. He held his title under a deed given to him by Adeline Greenwood, in November, 1881, and a deed from Charles, given in June, 1882, in order to convey his possible interest as tenant by the curtesy; the agreement being that the property was conveyed to Frederick in order to secure him for loans, and upon payment of the same he was to reconvey the property. The three Greenwoods all testified to this agreement in substantially the same terms. There was no evidence to contradict their testimony, and it is obvious that it was accepted at the trial as correct. No suggestion to the contrary has been made in the argument. The agreement for the reconveyance apparently was oral. The amount of the loans by Frederick, and the terms of payment, are not mentioned. There was nothing to show that, at the time of the alleged misrepresentations by Charles upon which the several actions were founded, the loans of Frederick were overdue, or that he was ever in possession of the premises for foreclosure or otherwise, or ever took or claimed the rents and profits thereof. It did not appear that the contract of letting the premises to Tilden was made in Frederick's name. There was no evidence of any express authority from Frederick to Charles, under which Charles was to act as the agent of Frederick. The only testimony bearing upon this point is contained in the following statement in the report: "In answer to interrogatories, Frederick also said that Charles Greenwood was away from home continuously, in California or elsewhere, from July 12, 1886, to the last part of October in the same year, and during that period Sabine and Durkee [real estate agents] had the management and care of said property, and collections of the

rents therefrom, under an arrangement made with Charles Greenwood, and assented to by him. He further said, that Charles Greenwood, during the time he [Frederick] held the record title, prior to said July 12, 1886, had the exclusive care and management of said property."

It thus appears, that, at the time of the letting of the house to Tilden, Frederick was to be regarded in equity as mortgagee of the premises. The agreement to reconvey might be shown by parol. *Campbell v. Dearborn*, 109 Mass. 180. *McDonough v. Squire*, 111 Mass. 217. *Hassam v. Barrett*, 115 Mass. 256. *Davis v. Ney*, 125 Mass. 590. *Cullen v. Carey*, 146 Mass. 50. The defendant held the record title merely as security for his loans, and as between the parties their relation was the same as if the deed had been a mortgage. He must be considered merely as a mortgagee, not in possession of the mortgaged premises; and the same rules are applicable as if there had been a mortgage in the ordinary form. *Teal v. Walker*, 111 U. S. 242.

No rule of law is plainer than that a mortgagor of real estate has a right to the rents and profits, while he is allowed to remain in possession. *Wilder v. Houghton*, 1 Pick. 87. And when a lease is made by a mortgagor, after the mortgage, it does not bind the mortgagee, nor in any manner affect his right. There is no privity between him and the lessee, and no right in him to demand the rent reserved by the lease. *Fitchburg Cotton Manuf. Co. v. Melven*, 15 Mass. 268. *Boston Bank v. Reed*, 8 Pick. 459, 462. *Mayo v. Fletcher*, 14 Pick. 525, 531. *Teal v. Walker*, 111 U. S. 242. In order to give him such right, there must at least be an entry by him, and notice to the tenants to pay rent to him, or some act equivalent thereto. *Stone v. Patterson*, 19 Pick. 476. *Welch v. Adams*, 1 Met. 494. *Morse v. Goddard*, 13 Met. 177.

In the present case, upon the testimony as given, the mortgagors, Adeline and Charles Greenwood, one or both, were entitled to the rents and profits of the mortgaged premises. They were, so far as appears, allowed to remain in possession, and to enjoy the income of the property. Their promise to Frederick, so far as we can infer, was to pay interest, and not rent. No action by Frederick could have been maintained against them for the rents received by them. In letting the

house to Tilden, Charles Greenwood acted for Adeline or for himself, and not for Frederick. There was nothing in the relations of the parties as disclosed which gave to Charles an implied power to act as agent of Frederick in making the lease. All that the plaintiffs have shown is that Frederick allowed Adeline and Charles to remain in possession, and assented to their doing whatever they pleased in respect to the care and management of the property, and the collection of the rents. The security for his loans may have been much more than sufficient, or, if not, he may have been content to allow Adeline and Charles, who are stated by the plaintiff's counsel to have been the parents of Frederick, to get what they could out of the property. At any rate, nothing is disclosed in the testimony which would warrant a jury in finding that Charles was acting as Frederick's agent in letting the property, or that Frederick was responsible for any misrepresentations which Charles may have made as to its condition.

This point was not discussed in the argument of the case, but it is presented by the careful report of the testimony by the justice who presided at the trial, and, as it is decisive of the several cases, it is not necessary to consider other grounds of defence.

Judgments on the verdicts.

HENRY A. GOULD & another vs. ABE STEIN & another.

Suffolk. March 22, 1889. — September 4, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Sale by Sample.—Warranty of Quality.

A sale was of a certain number of "bales Ceara scrap rubber, as per samples, . . . of second quality." *Held*, that there was a twofold warranty, of conformity to sample and of quality, which was broken by a failure to deliver rubber of second quality, irrespective of whether it was equal to the samples.

CONTRACT to recover for a breach of warranty of quality of one hundred and two bales of Ceara rubber, sold by the defend-

ants to the plaintiffs. Trial in the Superior Court, without a jury, before *Pitman*, J., who allowed a bill of exceptions, which so far as material is as follows.

There was evidence tending to show the following facts. The defendants, who did business under the name of Abe Stein and Company, were importers of rubber in New York; and the plaintiffs, who did business under the name of Henry A. Gould and Company, were jobbers and dealers in rubber in Boston. The defendants had before the sale employed one Greene, a broker, to sell rubber for them, including that in question, and had given him among others a sample of second quality Ceara scrap rubber. This sample Greene brought to the plaintiffs' office and gave to them, representing it to be a sample of second quality Ceara rubber then in the defendants' store. Afterwards the plaintiff Gould went to the defendants' store, where a large part of the rubber in question was stored, at the broker's request, to settle terms of payment, and while there made some examination of several bales of rubber, and had an opportunity to examine as many as he wished. He then said to one of the defendants, that, if the rubber examined was a fair sample of the goods, he would buy the rubber in question. That portion of the rubber bought which was stored elsewhere than in the defendants' store was substantially of the same quality. After this examination, the parties went into the defendants' office and had some discussion as to prices and terms. The broker then sat down and wrote bought and sold notes, reading them over to the parties line by line as he wrote them, and, after signing them, gave them to the respective parties. The bought note, to which the sold note corresponded, was signed by the broker, and recited: "Sold to Messrs. Henry A. Gould & Co. on account of Messrs. Abe Stein & Co. one hundred and forty-eight (148) bales Ceara scrap rubber, as per samples, viz. forty-six (46) bales of first quality, marked A, at forty-seven (47) cents per pound and one hundred and two (102) bales of second quality at forty-two and one half (42½) cents per pound. . . . All payable by four (4) months' note to buyers' own order, with interest at rate of six (6) per cent per annum from delivery." The rubber was then duly forwarded by the defendants, and delivered to the plaintiffs. Eight

of the bales received by the plaintiffs, and still in their possession, were of good second quality, and the remaining bales were of a third quality, and very inferior. The second quality of rubber is well known to the market as distinct from a third or inferior quality. It appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The plaintiffs did not see before the sale any bales of third quality rubber, and did not discover that the rubber delivered was not of second quality until some time after the sale.

The plaintiffs contended that the purchase of this rubber was made on the faith of the samples furnished by Greene, and also that the broker's notes contained a warranty that the goods were of a second quality. The defendants contended that the purchase was made upon the examination of the rubber made by Gould at the defendants' store, without reference to any other samples; that the same rubber that the plaintiffs bought had been delivered to them, and that the contract had been fully complied with; and asked the judge to rule, as matter of law:

"1. That the examination of the rubber by the plaintiff Gould was such, and his opportunity for examination so complete, that the plaintiffs cannot maintain this action for breach of warranty.

"2. That if, at the time of making the contract, the plaintiff Gould had in mind a sample previously shown to him by Greene, and the defendants had in mind the several bales of rubber examined by Gould at the store, and so the parties were not agreed as to the samples named in the contract, there was no contract of warranty on which this action can be maintained.

"3. That the court must determine whether the samples referred to in the broker's note were those exhibited by Greene to Gould, or the samples examined by Gould at the defendants' store.

"4. That if there be any warranty in the broker's note, and the court finds as a fact that the samples referred to in the contract were the bales examined by Gould at the defendants' store, then the warranty is only that the remainder of the one hundred and two bales were of as good quality as those examined by Gould."

The judge refused so to rule, but ruled and found as follows:

"1. The description in the broker's note of the one hundred and two bales of Ceara rubber as 'second quality' amounts to a warranty.

"2. Such an article is well known in the market as distinct from a third or inferior grade.

"3. I find that the defendants failed to deliver the article described and warranted.

"4. The examination made by the plaintiffs did not relieve defendants from the obligation of their warranty.

"5. I find, therefore, that there has been a breach of warranty, and that the defendants are liable to damages."

The judge did not find whether the sample referred to in the broker's note was the sample exhibited by Greene to Gould, or the samples examined by Gould at the defendants' store, or whether the rubber delivered to the plaintiffs differed from these samples; ruling that the broker's note contained an absolute warranty of second quality rubber, and that it was not necessary to determine the question as to which sample was referred to. At the request of the plaintiffs' counsel, the judge made the further finding, that, upon the whole evidence, there was nothing established inconsistent with the intent to warrant the rubber to be of second quality.

The judge found for the plaintiffs; and the defendants alleged exceptions.

The case was argued at the bar in March, 1889, and afterwards was submitted on the briefs to all the judges.

J. H. Dougherty (of New York) & *G. A. King*, for the defendants.

J. B. Warner & *H. E. Warner*, for the plaintiffs.

C. ALLEN, J. The determination of this case depends upon the construction to be given to the bought and sold notes, which were similar in their terms. It does not admit of doubt that these notes were intended to express the terms of the sale. They were carefully prepared, and were read to the parties line by line as they were written. Of course all the existing circumstances may be looked at, but the contract of the parties is to be found in what was thus written, when read in the light of those circumstances.

The goods respecting which the controversy has arisen were a certain lot of rubber which the defendants had on hand, and which could be identified. The transaction was a present sale, and not an agreement to deliver rubber in the future. The defendants now contend that the contract was executory, and that if there was any warranty there was none which survived the acceptance of the goods by the plaintiffs; but the argument that it was not an executed present sale finds no support in the bill of exceptions, and no such point was taken at the trial, and there is no occasion to consider the further question whether, in case of an executory agreement to sell, a warranty will survive the acceptance of the goods.

The bought note which the plaintiffs put in evidence was of "148 bales Ceara scrap rubber, as per samples, viz. 46 bales of first quality, marked A, . . . and 102 bales of second quality." The controversy relates only to the one hundred and two bales. It appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The court also found that Ceara rubber of second quality is well known in the market, as distinct from a third or inferior grade; and there was evidence which well warranted this finding. The parties in their contract recognized the existence of different grades or qualities, though all of the rubber properly classified as of first quality or of second quality might not be of an exactly uniform standard or grade.

The plaintiffs at the trial claimed damages merely on the ground that the one hundred and two bales were not of second quality, and made no claim of inferiority to the samples shown, as a distinct ground, but waived all claim founded on the exhibition of samples; and the court found damages for the plaintiffs solely on the ground that the defendants failed to deliver rubber of the second quality, ruling that the broker's note contained an absolute warranty of second quality rubber. If this ruling was right, it disposes of the defendant's second and third requests for instructions.

The general rule is familiar and admitted, that a sale of goods by a particular description imports a warranty that the goods are of that description. *Henshaw v. Robins*, 9 Met. 83. *Har- rington v. Smith*, 138 Mass. 92. *White v. Miller*, 71 N. Y. 113.

Osgood v. Lewis, 2 Har. & Gill, 495. *Randall v. Newson*, 2 Q. B. D. 102. *Jones v. Just*, L. R. 3 Q. B. 197. *Josling v. Kingsford*, 13 C. B. (N. S.) 447. *Bowes v. Shand*, 2 App. Cas. 455. And where goods are described on a sale as of a certain quality, which is well known in the market as indicating goods of a distinct though not absolutely uniform grade or standard, the description imports a warranty that the goods are of that grade or standard. In such cases, the words denoting the grade or quality of the goods are not to be treated as merely words of general commendation, but they are held to be words having a specific commercial signification. Thus, in *Hastings v. Lovering*, 2 Pick. 214, the words in a sale note, "Sold Mr. E. T. Hastings two thousand gallons prime quality winter oil," were held to amount to a warranty that the article sold agreed with the description; and in *Henshaw v. Robins*, 9 Met. 83, 87, it was said that the doctrine laid down in that case has ever since been considered as the settled law in this Commonwealth. So in *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203, it was held that, where a manufacturer of flour marked it as of a particular quality, viz. "Trafalgar Mills Extra Superfine," it amounted to a warranty of its being of such a quality. A similar doctrine may be found in *Hogins v. Plympton*, 11 Pick. 97; *Winsor v. Lombard*, 18 Pick. 57, 60; *Forcheimer v. Stewart*, 65 Iowa, 593; and *Mader v. Jones*, 1 Nova Scotia, 82. In *Gardner v. Lane*, 9 Allen, 492, and 12 Allen, 89, it appeared that the statutes provided for the preparation, division into different qualities, packing, inspecting, and branding of mackerel, and it was held that, if a certain number of barrels of No. 1 mackerel were sold, and by mistake barrels of No. 3 mackerel were delivered, no title passed to the purchaser, and that the barrels of No. 3 mackerel thus delivered by mistake might be attached as property of the vendor, and that each different quality, after being thus prepared for market, was to be regarded as a different kind of merchandise, so that no title passed to the vendee; there being no assent on the part of the vendee to take the No. 3 mackerel in place of those which he agreed to buy.

Now, if the words "as per samples" had not been in the bought note, it would be quite plain that the present case would fall within the ordinary rules above given. But the

insertion of those words raises the inquiry whether they limit the implied warranty of the vendor, so that, if the rubber sold was equal in quality to the sample, he would be exonerated from liability, though it was not entitled to be classed as of the second quality. If no other meaning could be given to the words "as per samples," except that they alone were to be considered as showing the quality of rubber to be delivered, the argument in favor of the defendants' view would be irresistible. So, if there was a plain and necessary inconsistency between the two descriptions of the rubber, it might perhaps be successfully contended that the vendor's obligation was only to deliver rubber which would conform to the inferior quality described; that is to say, that, in case of such inconsistency, the words "as per samples" should prevail, and the words "of second quality" be rejected. If it were to be held that the vendor's obligation was fulfilled by delivering rubber of a quality equal to the samples, though it was not of the second quality, then the words "of second quality" would mean nothing, or they would be overborne by the words "as per samples." But if it is found that the bought note admits of a reasonable construction, by which a proper significance can be given both to the words "as per samples" and also to the words "of second quality," there will be no occasion to disregard either.

Cases are to be found in the books, where such a construction has been given to contracts of sale. Thus, in *Whitney v. Boardman*, 118 Mass. 242, a sale of Cawnpore buffalo hides, with all faults, was held to mean with such faults or defects as the article sold might have, retaining still its character and identity as the article described; and the court cited with approval the case of *Shepherd v. Kain*, 5 B. & Ald. 240, where there was a sale of a copper-fastened vessel, to be taken "with all faults, without allowance for any defects whatsoever," and this was held to mean only all faults which a copper-fastened vessel might have; the court saying, by way of illustration, "Suppose a silver service sold 'with all faults,' and it turns out to be plated." So in *Nichol v. Godts*, 10 Exch. 191, an agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," was held to be not complied with by the tender of oil which was not foreign refined rape oil,

although it might be equal to the quality of the samples. The decision of this case has stood in England, though not without some questioning at the bar. See *Wieler v. Schilizzi*, 17 C. B. 619; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Mody v. Gregson*, L. R. 4 Ex. 49; *Jones v. Just*, L. R. 3 Q. B. 197; *Randall v. Newson*, 2 Q. B. D. 102.

In the present case, by a fair and reasonable construction of the bought note, effect can be given to both of the phrases used to describe the rubber. Construed thus, the article sold was one hundred and two bales of Ceara rubber, of the second quality, and as good as the samples. The rubber delivered was, in fact, Ceara rubber; there was no question that it was of the right kind. But it was not of the second quality. There is no necessity to disregard the words describing the rubber as of the second quality. They signified a distinct and well known, though not absolutely uniform, grade of rubber. There was no exact standard or dividing line between rubber of the second quality and rubber of the third quality, any more than there is between daylight and darkness. But nevertheless a decision may be reached, and it may be easy to reach it in a particular case, that certain rubber is or is not of the second quality. This general designation being given, the specification "as per samples" being also included in the note, the rubber must also be equal to the samples. It must be rubber of the second quality, and it must be equal to the samples. If it fails in either particular, it is of no consequence that it conforms to the other particular. There is no inconsistency in such a twofold warranty, and this rubber having been found to be not of the second quality, the warranty was broken, without regard to the question whether or not it was equal to the samples.

The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should merely conform to that description. *Henshaw v. Robins*, 9 Met. 83. *Jones v. Just*, L. R. 3 Q. B. 197. And the exhibition of a sample is of no greater effect than the giving of an opportunity to

inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the goods shall reasonably answer the description given, in its commercial sense. *Drummond v. Van Ingen*, 12 App. Cas. 284. *Mody v. Gregson*, L. R. 4 Ex. 49. *Nichol v. Godts*, 10 Exch. 191. In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality, notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.

The point urged in the defendants' argument, that the plaintiffs' remedy was destroyed by their acceptance of the goods, was not taken at the trial, and no ruling was asked adapted to raise the question as to the effect of such acceptance.

For these reasons, in the opinion of a majority of the court, the entry must be *Exceptions overruled.*

LUCINDA A. COLLAMORE vs. ALEXANDER H. GILLIS.

Suffolk. April 3, 1889. — September 4, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Landlord and Tenant — Trade Fixtures.

A baker's oven, built of bricks and mortar and with an iron lining and door, so united with the building in which it was placed that the two were inseparable without the destruction of the oven and a substantial injury to the building, was held not to be a removable trade fixture.

TORT for the removal of an oven from a bakery belonging to the plaintiff. Trial in the Superior Court, without a jury, before *Lathrop, J.*, who found for the defendant, and reported the case for the determination of this court, as follows.

The plaintiff made a lease of the bakery to one Webster for the term of nine years from July 1, 1881, the lease providing that "all future erections and additions to or upon" the demised

premises should be delivered up to the lessor at the termination of the lease. The defendant was the assignee from Webster of the lease, and occupied the premises from August 17, 1887, till January 19, 1888, and paid rent to the plaintiff. At the date of the lease the premises had for a long period been used as a bakery, and such use continued up to January 19, 1888. Besides two baker's ovens already in the basement, Webster in 1884 erected another in the basement in the following manner. There was an overhead chimney extending down several feet into the cellar from the floor above, built into and against the cellar wall. There was a portable furnace with a smoke pipe running into the flue of this chimney, which was removed by him. The cellar bottom was of brick with a covering of cement. Without removing the cellar floor, an oven was built upon it against the cellar wall. This oven consisted of eleven or twelve thousand bricks set in mortar to hold the same, and an iron interior and door. The brickwork was "tied in" to the cellar wall as follows: two slots, about two and a half feet long, six inches wide, and four inches deep, were cut into the cellar wall, and the masonry of the oven was built into said slots, so as to "tie" the oven to the cellar wall. About two feet and a half of the bottom of the overhead chimney was cut away, leaving the flue exposed, and the oven was built up thereto, so that the flue or smoke vent of the oven became continuous with the flue of the chimney, and each alternate layer or course of the brick of the oven was lapped into the brick of the chimney, so as to make the chimney and oven continuous. A trench, about one foot deep and several feet wide and long, was dug in front of the oven doors. The sides of the trench were banked up with brick to hold the earth back, and the bottom of the trench was concreted. This trench was used to enable the stoker to remove ashes, and it was necessary to the convenient use of the oven.

In December, 1887, during the term of the lease, this oven being then out of repair, the defendant, who had purchased the oven, sold it, and authorized the purchaser to remove it. The purchaser did remove it, and in so doing left the holes or slots in the cellar wall open, and left the chimney about two and a half feet shorter than it was originally, and the chimney flue open at the bottom. The draught of the chimney in the rooms

above was thus impaired. The oven was not and could not have been removed intact, but the masonry of which it was composed was knocked down, and the bricks were taken away.

The judge found the value of the oven to the building to be one hundred dollars, aside from a damage of ten dollars to the building from the removal; and that the oven was a trade fixture; and ruled that the plaintiff could not recover for the removal. If, as matter of law, the oven was not a trade fixture, and the plaintiff can recover for the removal of the oven, judgment was to be entered in her favor for one hundred dollars; otherwise, judgment for the defendant.

The case was submitted on briefs to all the judges.

S. J. Elder & F. A. P. Fiske, for the plaintiff.

I. R. Clark & F. Ranney, for the defendant. The oven was put in and taken out during the term of the lease, and was obviously designed for the purposes of trade. *Van Ness v. Pacard*, 2 Pet. 137. It had no foundation of its own, but was placed on the cellar bottom. One side only was slightly fastened to the cellar wall by being "tied in" in two slots, and this did not necessarily destroy its character as a trade fixture. *Gaffield v. Hapgood*, 17 Pick. 192. *Bliss v. Whitney*, 9 Allen, 114. *Hanrahan v. O'Reilly*, 102 Mass. 201. *Guthrie v. Jones*, 108 Mass. 191, 195. *Brown v. Wallis*, 115 Mass. 156. *Hill v. Sewald*, 53 Penn. St. 271. *Conrad v. Saginaw Mining Co.* 54 Mich. 249. An article does not necessarily cease to be a trade fixture because in order to be removed it must be taken in pieces. *Wall v. Hinds*, 4 Gray, 256. *Antoni v. Belknap*, 102 Mass. 193. *Watriss v. Cambridge National Bank*, 124 Mass. 571, 575. *Ex parte Bentley*, 2 M., D. & DeG. 591. *Moore v. Wood*, 12 Abb. Pr. 393. *Dostal v. McCaddon*, 35 Iowa, 318. *Davis v. Moss*, 38 Penn. St. 346. *Penton v. Robart*, 2 East, 88.

Nothing contained in bricks set in mortar can practically be removed intact. The brickwork must be knocked in pieces, but, after removal, the bricks may be again used. In this case, the oven had an iron interior and doors, which are not found by the report to have been removed otherwise than intact, and by resetting these in the bricks the essential character and value of the article could be preserved. The removal of the oven caused no injury to the estate, other than impairing the draught of the

chimney, and this cannot necessarily be said to be material. The other damage was committed by Webster, and not by the defendant. The covenant in the lease to yield up in good order "all future erections and additions" to or upon the premises, does not deprive the tenant of the right to remove trade fixtures put in during the term. *Holbrook v. Chamberlain*, 116 Mass. 155, 162.

C. ALLEN, J. In determining whether an addition made by a tenant to a leased building is removable or not by him during his term, the chief element to be considered is the mode of its annexation, and whether it can be removed without substantial injury to the building or to itself. The intention with which it was put there, though often an element to be considered, is of secondary importance. *Wall v. Hinds*, 4 Gray, 256, 270. *Whiting v. Brastow*, 4 Pick. 310. *Hanrahan v. O'Reilly*, 102 Mass. 201, 208. *Weston v. Weston*, 102 Mass. 514, 519. Amos & Ferard on Fixtures, (3d ed.) 7, 65. It is true that machines or structures which cannot be severed without taking them in pieces may nevertheless often be removed. *Antoni v. Belknap*, 102 Mass. 198. In *Penton v. Robart*, 2 East, 88, which is sometimes cited as supporting a broader doctrine, all that was removed by the tenant was a superstructure of wood, which had been brought from another place and put upon a brick foundation let into the ground. He pulled down the wooden superstructure and carried away the materials, but did not undertake to remove the brick foundation, which perhaps was not placed there by him. The case of *Van Ness v. Pacard*, 2 Pet. 137, goes further; but the more recent case of *Kutter v. Smith*, 2 Wall. 491, 497, appears to recognize a narrower rule, though without any extended discussion of the question. *Hill v. Sewald*, 53 Penn. St. 271, follows *Van Ness v. Pacard*, and *White's appeal*, 10 Penn. St. 252, is similar. We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed, or reduced to a mere mass of crude materials.

In the case before us, the oven was not like a machine or a structure, the parts of which are fitted to each other and can be taken apart and put together again at pleasure in some other place. It had, so to speak, no removable identity, but when

taken down it necessarily lost its character as an oven, and, with the exception of the iron lining and door, became mere bricks and mortar. When built, it was in the nature of a fixed and permanent structure, which was so united with the building that the two became inseparable without the destruction of the one, and a substantial injury to the other. Under such circumstances, we think the better reason is in favor of holding that the oven was not removable, and this view is more in accordance with the cases which have heretofore arisen in this Commonwealth. This result is also strongly supported by the decision in *Whitehead v. Bennett*, 27 L. J. Ch. 474. The authority of this case, it is said in *Amos & Ferard on Fixtures*, (3d ed.) 63, has never been impugned in England, and it was cited with approval and commendation by Lord Chancellor Selborne, in *Wake v. Hall*, 7 Q. B. D. 295, 301. See also *Sunderland v. Newton*, 3 Sim. 450; *Jenkins v. Gething*, 2 Johns. & Hem. 520; *Ombony v. Jones*, 19 N. Y. 234; *Ford v. Cobb*, 20 N. Y. 344.

The result, in the opinion of a majority of the court, is, that according to the terms of the report there must be judgment for the plaintiff for one hundred dollars.

Judgment for the plaintiff.

ANASTASIA HENRY vs. CITY OF NEWBURYPORT.

Essex. November 9, 1888. — September 5, 1889.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Land on Tide-Water — Interruption of Right of Drainage.

The owner of land adjoining tide-water, but not accessible by navigation from the sea, has no right to have the tide ebb and flow, for the drainage of his premises, across flats or the shore, between his land and low-water mark, belonging to another, and such other owner by filling up his land will not become liable to such owner in an action for the interruption of such drainage.

TORT for filling up flats at a public landing place in Newburyport, and interrupting the plaintiff's right of drainage upon

and across such flats into tide-water. Trial in the Superior Court, before *Thompson, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions, which, so far as material, appears in the opinion.

The case was argued at the bar in November, 1888, and afterwards was submitted on the briefs to all the judges.

F. W. Hale & N. N. Jones, for the defendant.

H. I. Bartlett, for the plaintiff.

DEVENS, J. Assuming, in the first instance, that the defendant city is responsible for the filling up of the landing place, and that the work done for this purpose is to be treated as the act of its servants, but without so deciding, we proceed to inquire whether any injury has been done to the plaintiff for which she is entitled to a remedy by this action. The plaintiff's premises, upon which stood a building, consisted partly of ledge and partly of flats that had been filled up, forming a sort of wharf faced with stone towards the water. The rear and one side, which were faced with the stone wall, were bounded by the ancient landing place in question, and the tide was accustomed to flow across it and the flats connected with it, up to and about the plaintiff's premises, and to some extent flowed into and out of her cellar until the filling complained of. There was no evidence that the filling was done in any negligent or improper manner. She had no title to any part of the landing place, the fee of which was claimed by the defendant, nor to any flats between her premises and low-water mark. The plaintiff had been accustomed to drain the surface water and the refuse of her premises into tide-water or upon the landing place, according as the tide was in or out, and drains from the cellar led out on the flats beyond her premises. She had also a row of privies projecting over the edge of her premises, so that the droppings fell upon the landing place or into the water. There was no evidence that the defendant knew that the premises were thus drained, except that the superintendent of streets, before the land in the rear of the premises was filled, prevented the plaintiff from digging a cesspool there, into which drains were to empty. There was no access to the plaintiff's premises by water, and thus no interference therewith by the filling of the landing place, but she claims a right to have the tide flow over

it and up to her premises, so that she may thus dispose of her sewage. Even if the filling by the defendant was an unauthorized act, and thus a nuisance, the remedy therefor is by indictment, unless the plaintiff shall show that she has sustained some special and peculiar damage. She does not show this, unless she shows that she has a right, as against the public or the owner in fee of the landing place, to have the water ebb and flow over it and the flats in the rear of her premises, which are a part of it, in order that she may continue to use the tide-water as she has heretofore done.

Whether she has acquired, or could acquire, by prescription, a right to an ebb and flow of the water for this purpose over the lands of others, is a question not before us, as it was not upon any such asserted right that she was allowed to recover, nor was any question submitted to the jury in relation thereto. Nor does the instruction of the court treat the inquiry whether the defendant actually owned (as it claims to do) the fee of the landing place as of any importance. The learned judge who presided held that the plaintiff "was entitled to have the tide ebb and flow up to her premises as it naturally would, and what advantage or benefit might accrue especially to her estate by reason of it she had a right to. . . . She had the right to have the water flow in under this building if she saw fit to, — it would be one of her rights. She had the right to have the tide flow in and flow out, and they have no cause of complaint for her doing that." The question is thus presented, whether it is the right of an owner of land situated in the vicinity of tide-water to have the water flow over the premises of others owning flats or the shore between high-water and low-water mark to his own.

The Colony ordinance of 1641-47, which gave to the proprietor of the upland property in the shore between high-water and low-water mark where the sea did not ebb more than one hundred rods, subject to the public right of fishing, fowling, passage over the same, etc., had but a single reservation which would prevent its enclosure, — "that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves, to other men's houses or lands." Col. Laws, (ed. 1660,) 50, (Whitmore's

ed. 170,) *Liberties Common*. Anc. Chart. 148, 149. This secured to such proprietor, not merely an easement, but a property in the land in fee, with full power to reclaim the flats by building wharves, or enclosing them, so as to exclude navigation, provided he did not cut off his neighbor's access to their houses or lands. He could erect wharves or other structures thereon, could fill up the same, and plant stakes thereon, even to the obstruction of the public right of fishing. Obviously, every erection on such flats would interfere, to some extent, with the pre-existing right of navigation, but it has been deemed a reasonable construction of the proviso in the ordinance, in view of its purpose to encourage the building of wharves, etc., to hold that, so long as no other proprietor was deprived of access to the sea thereby, they might lawfully be erected. *Commonwealth v. Roxbury*, 9 Gray, 451, 519, note, and cases cited. The Legislature could, for the protection of the rights of the public in navigation, or for the security of the coast, regulate the use of the territory between high-water and low-water mark, and could, without compensation, prohibit taking gravel from a beach, or building upon flats, whenever in its opinion such prohibition was necessary. *Commonwealth v. Tewksbury*, 11 Met. 55. *Commonwealth v. Alger*, 7 Cush. 53, 82, 104. *Attorney General v. Boston & Lowell Railroad*, 118 Mass. 345, 349.

While the object of the ordinance has often been declared to be the erection of wharves and similar structures and the reclaiming of the flats, we have found no case in which it has been held that the owner of lands not accessible by navigation from the sea had any cause of complaint because of having been deprived by the erection of wharves or other solid structures, or by the filling up of flats, of the ebb and flow of the tide to his premises, or of any right thereby to drain over the lands of others. Flats and the beach may be, and often are, sold separately from the upland, and the only provision in the ordinance which limits the right of the owner thereof in favor of other proprietors is that already quoted in reference to access by the water to their lands.

In *Davidson v. Boston & Maine Railroad*, 3 Cush. 91, 105, the petitioners were the owners of tide-mills, across whose flats the respondent had been authorized to construct a railroad. It was

contended that they had a right to have these flats kept open, and to the free and unobstructed flow and reflow of water over them, so that, when deprived thereof by the construction of the railroad, they would be entitled to damages therefor. It was held that the owners of tide-mills had no right, either as against the public or as against conterminous or adjacent proprietors, to have these flats kept open for the use of their mills, but only to the flow of water in the channel below low-water mark, and where the tide does not ebb. "The adjoining proprietor," it is there said, "to the extent of one hundred rods, may build solid structures, and thus obstruct the flow and reflow of the tide, without objection, provided he does not wholly cut off his neighbor's access to his house or land; and if the mill-owner or conterminous proprietor suffers in consequence, it is *damnum absque injuria*."

We have discussed the case at bar, thus far, without reference to the St. of 1866, c. 149, which, with the amendments thereto, is embodied in the Pub. Sts. c. 19. By § 2 of this statute, "the general care and supervision of all the harbors and tide-waters, and of all the flats and lands flowed thereby within the Commonwealth," with certain exceptions, are entrusted to three harbor commissioners. The erection of all structures and the filling of all flats below high-water mark are to be done only by license from them, under their supervision, and subject to such terms as they may prescribe. The Pub. Sts. c. 19, § 17, provide that "every erection and work made or done within tide-water, without authority from the General Court or from said board, or in a manner not sanctioned by said board, where a license is required as hereinbefore provided, shall be considered a public nuisance, and liable to indictment as such," or the same may be restrained by injunction at the suit of the Attorney General, or of the district attorneys within their respective districts, upon the direction of the harbor commissioners. While this statute materially diminishes the right of owners of flats in regard to the erection of structures upon them, or the filling up or enclosure thereof, it confers no additional rights upon adjacent or conterminous proprietors. If the defendant has, under the statute, created a public nuisance, there is no liability therefor to the plaintiff. The infringement of the public right is to be

redressed by indictment or other public proceeding as for an injunction. While, if an individual suffers a special and particular damage by reason of a nuisance committed by another, he may maintain an action therefor, it can only be so when some right of his own has been invaded. The statute did not give the plaintiff any right to the ebb and flow of the tide-water over the defendant's land to her own. It was passed for a public purpose, the preservation and security of the coasts and harbors, and for the benefit of navigation, but it left the rights of adjacent and conterminous proprietors *inter sese*, as they before existed. If the act done by the defendant was wrongful, it was a wrong of which only the public could complain.

Nor is the fact important that the plaintiff was actually enjoying the ebb and flow of the tide for the purposes of her drainage when the filling took place. Unless she had a right to have it continued, she has sustained no private or individual wrong. In *Breed v. Lynn*, 126 Mass. 367, the owners of a wharf and dock who had dredged out a channel from their dock to some extent over flats belonging to others, and beyond the limits of their own ownership, which channel was injured and filled up by the discharge of sewage from a common sewer into the dock, were allowed to recover so far as the injury was within the limits of their ownership, but not beyond. The fact that they had prepared this channel on the lands of others gave them no special right that it should be kept open and clear, although its filling seriously interfered with access to their wharf.

The instruction that the plaintiff had a right to the ebb and flow of the tide over the landing place and flats to and over her premises was, in the opinion of a majority of the court, erroneous. Unless she had such a right, the loss or inconvenience she sustained did not proceed from any injury inflicted by the defendant of which the plaintiff can complain.

The view we have taken of this question renders it unnecessary to consider the other exceptions presented.

Exceptions sustained.

EDWARD EVERETT vs. TAY EDWARDS & others.

Suffolk. March 25, 1880.—September 5, 1880.

Present: MORTON, C. J., FIELD, W. ALLEN, & HOLMES, JJ.

Parties — Mortgagees — Party Wall — Building Act.

Mortgagees of real estate were *held* to be properly admitted as parties defendant to a suit in equity by the result of which their security might be impaired.

The owner of two adjoining city lots built a house upon each lot, each separated from the other by a brick wall, one half of which was on each lot, and subsequently conveyed the lots to different persons, each deed describing the boundary line between the houses as "a line running longitudinally through the centre of the partition wall between the houses"; and such wall stood unchanged as the partition wall between the houses for fifty years. *Held*, that the wall was a party wall.

One owner of a party wall may build it to a greater height to support an addition to his building, doing no injury to his co-owner; and the mere fact that in carrying up the wall he violates a building act will not render him liable to such co-owner.

BILL IN EQUITY, filed November 3, 1886, brought originally against the first named defendant alone, for the removal of a portion of a wall standing in part on his land, and for damages for its erection and maintenance. Subsequently certain mortgagees of his estate were admitted as parties defendant. The case was heard by *Field, J.*, who reported it for the consideration of the full court. The facts appear in the opinion.

R. M. Morse, Jr. & C. S. Hamlin, for the plaintiff.

E. W. Hutchins & J. H. Young, for the mortgagees.

W. ALLEN, J. In the year 1826 the owner of two adjoining city lots built a house upon each lot, each separated from the other by a brick wall, one half of which was on each lot. The next year he conveyed one of the lots to the plaintiff's grantor, and in 1828 he conveyed the other house to another grantee, under whom the defendants claim. In each deed the boundary line between the houses is described as "a line running longitudinally through the centre of the partition wall between the houses," and the same description is contained in the deeds to the plaintiff and to the defendants, which deeds were dated May 11, 1886, and June 1, 1883, respectively. The wall remained without change until July or August, 1885. In June, 1885,

the defendant Edwards borrowed of the defendants Ropes and Dexter \$20,000 on a mortgage of his estate, for the purpose of building an addition to his house, and soon after built up the wall so that it was five feet higher than the peak of the wall as it had been, and eighteen feet above the eaves, putting on a flat roof, and completing the work on September 1, 1885. On November 3, 1886, the plaintiff brought this bill against Edwards alone, to have him compelled to remove so much of the addition to the wall as is on the plaintiff's side of the division line, and for damages. After a hearing upon the merits, a decree was entered ordering the removal of the wall, from which the defendant Edwards appealed. Subsequently, and after the entry had been made on the docket that Edwards withdrew his appeal, the mortgagees, Ropes and Dexter, presented a petition praying that the decree might be vacated, and that they might be allowed to become parties defendant, and to defend the suit on the merits. At the same time, one Chipman, who held a second mortgage of \$5,000 on the estate, given by Edwards in September, 1885, filed a similar petition. The petitions were allowed, and the petitioners were admitted as defendants, and filed answers. The plaintiff appealed. The case was heard upon the merits, and reported to the full court.

The mortgagees are directly interested in the subject matter of the suit. It seeks to diminish the value of their security, and is brought to establish the right of the plaintiff to do so. If the plaintiff removed the wall without right, he would be liable therefor to the mortgagees. *James v. Worcester*, 141 Mass. 361, and cases cited. The bill is brought to establish and exercise for him his right to remove it. It is no answer to say, that, if the security is impaired, it will be in consequence of the wrongful act of the mortgagor with the permission of the mortgagees. The question whether the act was wrongful is a question upon which the mortgagees have a right to be heard. They are immediately interested in resisting the plaintiff's claim, and are necessary parties to the suit, and their petitions that the decree should be vacated and that they be admitted as defendants were properly allowed.

The wall, as it stood before it was built upon by Edwards, was a party wall. It was built and conveyed by the owner of both

estates as the partition wall between the houses, and has been used as a party wall by the several owners of the houses for fifty years. No express grant, or agreement, or statute, defines or limits the rights of the parties, and they are such as the law implies to have been the intention of the parties from the grant, expressed or implied from user of the wall as a party wall, and it is immaterial whether the grant is by the single owner of both estates, or is the mutual grant of several owners. See *Webster v. Stevens*, 5 Duer, 553; *Richards v. Rose*, 9 Exch. 218. The wall must be taken to have been built as a single structure, and granted by the owner or owners of two estates to constitute the wall of the house upon each estate. It was not the dividing line between the houses, because it was a part of each house, and each owner had an equal right in the whole wall with the other owner. The estate which the owners have in it is an estate in a party wall, and the rights of the owners in it are found in their presumed intention in the mutual grant of a party wall, rather than by classifying it with other estates and deducing its qualities from the name given to it. The English courts, when, looking at the common interest and right of the parties, they call it a tenancy in common, do not mean that either party can have partition; and the courts of New York, when, considering the rights of one owner in the part of the wall on the land of the other owner, they say that each owns one half in severalty, with an easement in the other half, are not prevented from deciding in the same case that each can take down and rebuild the half of the other, (*Partridge v. Gilbert*, 15 N. Y. 601,) nor from deciding that the easement is not an incumbrance upon either estate, but a benefit to each. *Hendricks v. Stark*, 37 N. Y. 106. See also *Bertram v. Curtis*, 31 Iowa, 46.

We are not considering the frequent cases where the rights of the parties are defined by special terms or agreements, but the simple grant, express or implied, of a party wall; and this is a grant by the owner of both estates, or the mutual grant of the separate owners, of rights in a wall situated on both estates. What these rights are depends upon the presumed intention of the parties. The question involved in this case is, whether such a grant is limited as to the height of the wall to a particular wall, or to the wall which shall first be built under it,

or whether it gives to either party a right to build higher an established wall for the purpose of putting an addition upon his house. It is assumed that this will be done without impairing the integrity or stability of the existing wall.

The purpose of each of the adjoining owners in providing for a party wall is the same. It is intended to form part of a building on his land. A party wall is as beneficial to him as a several wall, and it is no detriment to him, for the use which one owner makes of it as a wall of his building cannot impair the use of the other. In effect, each owner acquires the right to build one half of his wall upon his neighbor's land, and each, contributing his portion of the expense, has a right to an equal benefit in a wall so built. The wall is a substitute to each for a separate wall, and there can be no implied limitation in his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor. With this limitation, it will be presumed that each intended it for all uses and purposes to which the wall of his building would ordinarily and properly be put. That presumption is for the advantage of both, and to the detriment of neither. If the party wall cannot be built up, neither house can be raised without building a new wall; for if one owner could lawfully build a several wall upon the part of the wall over his own land, it would not be a right of practical value; he could not build on it a sufficient wall. It is not reasonable to suppose that each party intended that he should never use the wall for a building higher than the one that should be first erected, and a provision to that effect detrimental to both parties and beneficial to neither cannot be presumed. If it is said that one owner may not wish to use the wall as built up, and may prefer not to have the adjoining building higher than his own, the answer is, that that is a particular and exceptional circumstance which cannot be presumed. It is presumed to be a detriment to the owner of a building to deprive him of the power to make additions to it, and grants and contracts will be construed on that presumption unless it is controlled by their terms. Not only would a provision implied in a grant of a party wall that it should not be carried higher than as originally constructed, be contrary to the interests and the apparent intention of the parties, but it would not be in

accordance with public policy. The public interest is not promoted by putting impediments in the way of erecting buildings, and the law will not be swift to construe the acts of parties so as to produce that effect.

We have been referred to very few authorities upon the subject, and the question of the right of one owner of a party wall to build it up seems to have been very seldom raised. *Phillips v. Bordman*, 4 Allen, 147, discusses the right in a party wall as an easement, and there is certainly nothing in the case unfavorable to the right to build upon the wall. *Sanborn v. Rice*, 129 Mass. 387, was tort for breaking and entering the plaintiff's close by building up the partition wall between the houses of the plaintiff and the defendant, and the action was sustained; but the only question considered in the opinion was whether there was any evidence that the plaintiff owned to the middle of the wall. It is said of that case in *Quinn v. Morse*, 130 Mass. 317, at page 322, that "so much of the wall as was carried up by the defendant on the plaintiff's land was not as wide as the original wall, nor was its face, toward the plaintiff's land, parallel with the centre line of that wall; and the defendant did not rely on any right to carry up a party wall upon the plaintiff's land, but on the plaintiff's want of title in the land itself." *Quinn v. Morse*, *ubi supra*, was a bill in equity to restrain the defendant from building up a partition wall between him and the plaintiff. The plaintiff had conveyed the estate to the defendant, bounding on the middle of the partition wall. This sale was in pursuance of an agreement by which the defendant agreed to pay to the plaintiff for half of the wall what it was worth to the defendant for building a store on the land. The court say that the intention of the plaintiff that the wall should be a party wall, which the defendant would have a right to carry up in building his store, was manifested by the agreement. The agreement was only to sell one half of the wall for what it should be worth in building a store. The right to carry up the wall seems to have been inferred from the intention in the agreement that it should be a party wall.

In *McLaughlin v. Cecconi*, 141 Mass. 252, the whole wall was on the plaintiff's land, and belonged to him, and no question in regard to party walls arose. *Brooks v. Curtis*, 50 N. Y. 639, is

directly in point, and decides that one owner of a party wall has a right to build it up. In *Partridge v. Gilbert*, *ubi supra*, in which it was decided that one owner had a right to take down and rebuild a ruinous party wall, the wall was rebuilt higher than before. The party rebuilding was held not liable. It seems well settled that one owner of a party wall has a right to take down and rebuild it when ruinous. In *Campbell v. Mesier*, 4 Johns. Ch. 384, Chancellor Kent decided that one owner of a party wall who had rebuilt it could recover contribution from the other owner. In *Standard Bank v. Stokes*, 9 Ch. D. 68, it was said that one owner of a party wall, where the Metropolitan Building Act did not apply, had a right to lower the foundation so as to give him a subbasement. In *Field v. Leiter*, 117 Ill. 341, the wall was built by the plaintiff, one half on adjoining land. The defendant bought the adjoining land, and an agreement was made between the parties by which the defendant might use the wall as a party wall for his store, ten stories high, with the right to add to the height of it, the defendant agreeing to strengthen the wall and foundation by necessary additions thereto on his own side. It was held that the defendant had a right to make necessary additions to the foundation on the plaintiff's side. *Eno v. Del Vecchio*, 4 Duer, 53, decided that one owner might underpin and deepen the foundation, and raise the wall higher on his own land. *Matts v. Hawkins*, 5 Taunt. 20, has been cited as deciding that one owner of a party wall can lawfully take down an addition built upon it by the other owner. But this is expressly decided under the Building Act, 14 Geo. III. c. 78, which regulated the rights of the owners.

We have seen nothing in the English cases such as *Cubitt v. Porter*, 8 B. & C. 257, *Wiltshire v. Sidford*, 1 Man. & Ry. 404, *Stedman v. Smith*, 8 El. & Bl. 1, and *Watson v. Gray*, 14 Ch. D. 192, in which owners of a party wall are called tenants in common, and which decide that tenancy in a party wall has some of the qualities of tenancy in common, which suggests that one owner of a party wall for the lateral support of buildings can have partition of the wall, or cannot carry it up higher than it may originally be built for the purpose of using it as the wall of his building.

The limitation upon the right of each owner to use the wall as the lateral wall of such house as he may desire to erect is that he shall not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party wall, and the owners have equal rights in it, and the value of the wall to either owner cannot be thereby impaired; but neither owner has a right so to use the wall as to weaken or injure it. *Phillips v. Borden*, 4 Allen, 147. The judge who heard this case found that the wall was not insecure, and did not render the plaintiff's house insecure, and it does not appear that in any particular the new erection impairs the value of the old wall to the plaintiff.

The plaintiff contends that he can take advantage in this suit of the violation by the defendant Edwards of the St. of 1885, c. 374, and of the ordinances of the city of Boston, by building up the wall without a permit from the inspector of buildings, and by making the wall of less thickness than required by that statute and the ordinances. But these were not intended, as was the English statute before referred to, to regulate the rights of the parties between themselves, but for the public protection and security. The statute prescribes penalties for its violation, and provides for its enforcement by proceedings in equity by the inspectors of buildings. We do not think that the plaintiff can maintain any suit against the defendants merely on the ground that the wall was erected contrary to the provisions of the statute or of the ordinance. He must at least show some damage or detriment to himself in consequence. None is shown. The old wall cannot be affected by the statute. The fact that the new erection is a party wall does not expose the plaintiff to the animadversion of the law, or to any detriment in respect of the wall. The worst that could happen to him would be that it should be taken down.

We think that, as between the owners, Edwards had a right to carry up the wall, leaving the old part of the wall intact and secure. If the manner in which he did this was in violation of the statute, that fact does not give to the plaintiff the right to have the wall taken down.

Bill dismissed.

NATHAN MATTHEWS, JR. *vs.* ELLEN S. DIXEY.

Suffolk. January 29, 1889. — September 5, 1889.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Deed — Party Wall — Fence — Building Act — Injunction.

The owner of land on the north side of a city street conveyed two adjoining lots to different persons, each deed providing that "the centre of the easterly and westerly partition walls of the houses . . . first erected on the said land shall be placed on the division lines between the granted premises and the adjoining lots," and that the one who first built such a wall should be paid by the other, upon his using it, one half its cost. The grantee of the westerly lot erected a house on the front part thereof, with such a wall on the division line between the two, and built a wooden fence on the rest of the line. Subsequently, the grantee of the other lot proceeded to build a higher and deeper house thereon, conforming in all respects to a building act in force in the city, and for that purpose to carry up such wall and to extend it to the rear, necessarily displacing a part of the fence. *Held*, that such additions could rightfully be made without payment being first made of one half the cost of the existing wall, if no injury was done thereto, and that a bill in equity to prevent their being made could not be maintained.

BILL IN EQUITY, filed January 11, 1888, to prevent the defendant from using a brick wall, standing partly on her land and partly on that of the plaintiff, in erecting a proposed building on her land, and from so extending such wall as to displace a division fence. The case was heard by *Field, J.*, who ordered the bill to be dismissed; and the plaintiff appealed to the full court. The material facts appear in the opinion.

N. Matthews, Jr., pro se.

J. L. Thorndike, (W. S. Otis with him,) for the defendant.

W. ALLEN, J. The parties own adjoining lots on the north side of Beacon Street, in Boston. Both parties claim under the Boston and Roxbury Mill Corporation, which formerly owned the land extending northerly from Beacon Street to the harbor commissioners' line, and westerly from Hereford Street to West Chester Park. On March 15, 1886, the corporation conveyed to William Simes a parcel of this land measuring seventy-seven feet on Beacon Street, and on April 24, 1886, it conveyed to Nathan Matthews another parcel forty-eight feet in width, lying westerly of and adjoining the land conveyed to Simes. Each

deed contained the following provision: "The centre of the easterly and westerly partition walls of the houses and buildings first erected on the said land shall be placed on the division lines between the granted premises and the adjoining lots, and shall be good and sufficient walls, and the party first building such partition wall, whether the owner of the premises hereby granted or of an adjoining lot, shall be entitled to have and receive from the party using such wall one half the actual cost of so much of said wall, including the pile foundations and stone or brick work and fences, as he shall actually use." Nathan Matthews built a house upon his land, and afterwards conveyed it to the plaintiff. The centre of the easterly wall of the plaintiff's house coincides with the dividing line between his lot and that of the defendant. The wall is twelve inches thick and fifty-five feet high. The defendant is proposing to build a house upon her land higher and deeper than that of the plaintiff, and for that purpose to carry up the partition wall built by the plaintiff's grantor to a height of over sixty feet, and to extend it twelve feet in the rear.

To carry up the existing wall to the height to which the defendant proposes to carry it, it will be necessary, in order to comply with the Boston Building Act (St. 1885, c. 374), to add four inches to the thickness of the wall below the third story of the house, and to widen the foundation. The defendant proposes to add to the thickness of the wall and foundation on her own land, but it is contended by the plaintiff that it will not be practicable to get a sufficient foundation without renewing the existing foundation, and perhaps extending it somewhat further in the plaintiff's land. If this is rendered necessary by a proper use which the defendant makes of the existing wall, and is done without injury to the existing wall, we see no objection to it. If the foundation is insufficient for a proper use which the defendant proposes to make of the wall, or for such a wall as the defendant has a right to have, the right to strengthen or enlarge the foundation so as to make it sufficient is implied. If the defendant has a right to carry up the wall, she has a right to put in a foundation sufficient therefor, doing no injury to the existing wall. *Standard Bank v. Stokes*, 9 Ch. D. 68. *Eno v. Del Vecchio*, 4 Duer, 53. *Field v. Leiter*, 117 Ill. 341.

The right claimed by the defendant is to carry up the partition wall built by Nathan Matthews. Whether she has that right depends upon the construction to be given to, and the inferences to be drawn from, the deed to Simes, her grantor. The provision in the deed is somewhat blind, but on examination its meaning becomes evident. It may be assumed that the grantor owned a large tract of land, which it was selling in parcels to be built upon. It may also be assumed that the provision was intended as a general provision, to be applied to all the land sold, and to be inserted in all deeds of it, and that it was contained in the deed of the land that had been sold adjoining the Simes land on the east. The land conveyed to Simes was of sufficient width for several buildings. The words, "the easterly and westerly partition walls of the houses . . . first erected on the said land shall be placed on the division lines between the granted premises and the adjoining lots," plainly do not mean all partition walls between houses built on the land, but party walls of houses built on the easterly or westerly lines of the land conveyed. It was a grant of a right to build a party wall upon both the eastern and western sides of the lot, one half of which should be upon land not included within the lines of the description. This gave a right, or interest, or estate, in the adjoining land, which it is not necessary to attempt to name. The same right that was granted to the grantee was also reserved to the grantor. If this would not be inferred from the mere grant of the right to build a party wall, which is built upon both estates and belongs equally to both, the terms of the grant show that the benefit of the grantor equally with the grantee was intended. It not only gave the grantee the right to build a party wall, but gave the grantor the right to require that no wall of a building, except a party wall, should be built adjoining his line, and it further provided for the case of the erection of "such partition wall" by the owner of "an adjoining lot." It is also to be considered, that the provision was probably intended to be applied to all parcels sold, and to give mutual rights to and in party walls to the purchasers of different parcels, and that could not be done unless the grantor reserved to himself in the land conveyed the same rights which he granted in the land not conveyed.

The deed to Simes bounds his land on the east on land "recently conveyed by this corporation to William G. Saltonstall," but unless the right to build a party wall on the land was reserved in the deed to Saltonstall, the grant to Simes of that right would be nugatory. Unless the right was reserved in the deed to Simes, it could not have been granted to Matthews, and the plaintiff would now be unlawfully, or by mere license, maintaining a wall on the defendant's land. The true construction of the provision is, that when the corporation conveyed to Simes it gave and reserved the mutual right to build a party wall upon the line between them, with the further provision that neither party should make the wall of a house which he might erect on the line a several wall on his own land adjoining the line, but a party wall one half upon each estate. This is the meaning and effect of the provision in regard to the building first erected on the land. The plaintiff, then, as possessing the rights reserved by the grantor in the deed to Simes, and the defendant as possessing the rights granted to Simes by that deed, have equal and mutual rights in relation to a party wall. It is immaterial that the defendant claims under the elder deed, because the same right that was granted by that in the plaintiff's parcel was reserved in the defendant's. It is immaterial that the defendant has not paid to the plaintiff any of the costs of the wall; that is in no sense a condition precedent to the possession or the exercise of the right of the defendant in the party wall.

The plaintiff contends that the grant to erect a party wall is to the owner who shall first put up a building on the line, and is limited to such good and sufficient wall as shall be first erected. The general intention of the provision is that the walls of adjoining buildings on the lines of the land conveyed shall be party walls, and this is secured by providing that the wall first built on the line shall be a party wall. Before any wall is erected, either owner may build such a wall as he has occasion to use, being a good and sufficient wall. After the wall is built it is a party wall, and the ordinary rights and incidents of a party wall exist. The other owner can use it for any purpose for which a party wall upon the enjoyment of which no special restriction is placed can by law be used. One of these purposes and uses is to build upon it, if either owner has occasion

to carry it up. *Everett v. Edwards, ante*, 588. This case furnishes an apt illustration of the rule. The Boston and Roxbury Mill Corporation authorized and required Simes, if he should put up a two-story house upon the line, to make the wall of it a party wall. Did it intend to preclude itself and its assigns from using that wall for anything higher than a two-story building, and from ever putting up a three-story or a five-story house on the line without building up a several wall from the foundation on its side of the line? Did it intend that the accident of a first erection should determine the height to which either owner could ever carry up the wall? By giving the natural and reasonable construction to the provision, that the walls of buildings erected on the line should be party walls, in which the parties should have equal rights, the plain intention of the grantor will be carried out; either party can use the wall as it is, and either party can carry it up as the party wall of such house as he may have occasion to erect, in neither case injuring or impairing the wall as originally built.

The plaintiff objects that the addition of four inches to the thickness of the wall below the third story, which the defendant proposes to make on her side of the wall, will not be compliance with the law, which requires a wall sixteen inches in thickness. The report finds that the defendant does not intend to do anything which she may not be permitted to do under the building act by the inspector of buildings. This renders it unnecessary to consider whether it would be a ground for the interference of the court, at the suit of the plaintiff, if it appeared that the defendant intended or threatened to violate the building law. The report finds that the wall with the additional thickness proposed to be added by the defendant will be amply sufficient, and it does not appear that the original wall will be weakened, or the plaintiff injured by the changes proposed by the defendant. We think that the defendant has a right to carry up the wall, and to make such changes in the foundation as are necessary for that purpose.

The defendant also proposes to extend the wall twelve feet in the rear. This is the building of a new wall, rather than the enlargement of the original one, for it is not to be upon land occupied by that. Without relying upon the technical point

that the defendant's building is the first one to be erected on the land conveyed to Simes, we think that the provision was intended to apply to every part of the line, and cannot be limited to such part as may first be built against. It was intended to include every wall of a building first erected on any part of the line. The board fence put up by the plaintiff on the division line between the two lots, where the defendant proposes to extend the wall in the rear, was not the wall of a house or building, nor was it built one half on each side of the line.

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